FILED
SEP 19 1972
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

No. 72-451

PATRICIA LOU KENNEDY, DR. VERNON G. BOIDO, FRANCES V. DUREN, CHARLES T. TART, PH.D., THE CHURCH OF THE AWAKENING, A NEW MEXICO RELIGIOUS CORPORATION, AND JOHN W. AIKEN,

Petitioners,

vs.

BUREAU OF NARCOTICS AND DANGEROUS DRUGS, UNITED STATES DEPARTMENT OF JUSTICE; JOHN E. INGERSOLL, DIRECTOR,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

ROBERT J. BURDETT,
ROBERT J. BURDETT, JR.,
Bankers Building—Suite No. 2220,
105 West Adams,
Chicago, Illinois 60603,
Phone: (312) 641-0488,
DALE B. DILTS,
6022 Constitution, N. E.,
Albuquerque, New Mexico,
Phone: (505) 265-7538,
BRUCE M. GLEASON,
8155 Van Nuys Boulevard,
Panorama City, California 91402,
(213) 873-5980,
Attorneys for Petitioners.

THE GUNTHROP-WARREN PRINTING COMPANY, CHICAGO

INDEX.

	PAGE
Opinion Below	2
Jurisdiction	2
Questions Presented for Review	2
Constitutional Provisions, Statutes and Regulations Which the Case Involves	3
Statement of the Case	4
Basis for Federal Jurisdiction Below	9
Reasons Relied Upon for Allowance of the Writ and Argument	9
Argument	9
Conclusion	22
Appendix	A2
Citations	i

Table of Authorities Cited.

Abington School District v. Schemp, 374 U. S. 203	16
Arizona v. Attoka, No. 4098, Maricopa County, July 6, 1960	11
Braunfeld v. Brown, 366 U. S. 599	15
Cantwell v. Connecticut, 310 U. S. 296	13
Everson v. Board of Education, 330 U. S. 1	15
Fowler v. Rhode Island, 345 U. S. 67	15, 16
Kennedy v. Director of Bureau of Narcotics and Dangerous Drugs, 459 F. 2d 415	15
Niemotko v. Maryland, 340 U. S. 268	15

People v. Woody, 61 Cal. 2d 716; 394 Pac. 2d 813, 1962 11
Sherbert v. Verner, 374 U. S. 398 .....13, 14, 16
Torcaso v. Watkins, 367 U. S. 492 15-16
United States v. Ballard, 322 U. S. 78 16

STATUTES.

Drug Abuse Control Amendments of 1965, H. R. 2—
House Version A1
Definitions Added and Regulations Authorized
(House Report 130-89th Congress) A6, A7
Proscriptions and Exemptions A7
Drug Abuse Control Amendments of 1965 as Adopted—
Definitions and Authority for Regulations Added—
21 U. S. C. 321(v) A6, A7
Proscriptions and Amendment Added—
21 U. S. C. 360(a) (a), (c), (f) A7
Federal Food, Drug and Cosmetic Act—
Issuance and Procedure on Regulations—
21 U. S. C. 371(a) and (e) A8, A9
Comprehensive Drug Abuse Prevention and Control Act of 1970—
Savings Provisions—21 U. S. C. 321, note—
savings provisions A39

REGULATIONS.

Regulation—Pursuant to Drug Abuse Control Act Naming Peyote and Exempting Native American Church—21 C. F. R. 320.3(c)(3) and 21 C. F. R. 166.3(c)(3) A10
Regulation—Continuing Exemption of Native American Church under Current Law—21 C. F. R. 307.31.. A40

MISCELLANEOUS.

Letter From Commissioner of Food and Drugs A4

Order of Director of Bureau of Narcotics and Dangerous Drugs A11-A33

House Concurrence with Senate on H. R. 2—Congressional Record, July 8, 1965, p. 15977 .....A2-A5

Opinion—Court of Appeals, Ninth Circuit (459 F. 2d 415-418) A35-A38

MONOGRAPHS IN EVIDENCE.

"The Peyote Religion Among the Navaho"—David F. Aberle, Aldine Publishing Company, 1966.

"The Peyote Religion"—J. S. Slotkin, Free Press, Glencoe, Ill., 1956.

"The Peyote Cult"—Weston LaBarre, The Shoe String Press, Inc., 1964.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

No. .....

PATRICIA LOU KENNEDY, DR. VERNON G. BOIDO, FRANCES V. DUREN, CHARLES T. TART, PH.D., THE CHURCH OF THE AWAKENING, A NEW MEXICO RELIGIOUS CORPORATION, AND JOHN W. AIKEN,

Petitioners,

vs.

BUREAU OF NARCOTICS AND DANGEROUS DRUGS, UNITED STATES DEPARTMENT OF JUSTICE; JOHN E. INGERSOLL, DIRECTOR,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

The Petitioners, Patricia Lou Kennedy, Dr. Vernon G. Boido, Frances V. Duren, Charles T. Tart, Ph.D., The Church of the Awakening, a New Mexico Religious Corporation, and John W. Aiken, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on April 5, 1972.

OPINION BELOW.

The opinion of the Court of Appeals, Ninth Circuit, reported at 459 F. 2d 415-418, is reproduced in the Appendix, pp. A33-39. The order of the Director is likewise reproduced in the Appendix, pp. A11-33.

JURISDICTION.

The judgment of the Court of Appeals for the Ninth Circuit was entered April 5, 1972. A timely petition for rehearing and suggestion for rehearing in banc was denied June 21, 1972.

The order of the Director was dated September 10, 1970 and published September 23, 1970. Jurisdiction of this Court is invoked under 21 U. S. C. 371(f) (4) and 28 U. S. C. 1254(1).

QUESTIONS PRESENTED FOR REVIEW.

Can a regulation promulgated to protect a religious practice under the free exercise clause of the First Amendment be so restricted as to deny equal protection of the law? Does not such restriction violate the equal treatment requirements of the establishment clause? Is not the regulation to be construed to observe equal treatment requirements?

Where a regulation protecting a religious right is so construed by the administrating officer as to favor one church and deny another, is it not the construction which is illegal, rather than the regulation itself whose purpose is benign and prompted by the First Amendment?

Where a regulation is promulgated to protect the free exercise of a religious practice by the Native American Church, can a like use for religious purpose be denied The Church of the Awakening on the basis that its use, while religious, is less central to its tenets than with the Native

COPY BOUND CLOSE IN CENTER

American Church? Is this not interference with free exercise?

Can denial of a religious practice be justified where like practice is granted a church composed largely of American Indians on the basis that both First and Fourth Amendment application is different to the church made up of the American Indians?

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS WHICH THE CASE INVOLVES.

Constitution—Religious freedom provisions of the First Amendment:

> "Congress shall make no laws for the establishment of religion, or interfere with the free exercise thereof."

Statutes:

Drug Abuse Control Amendments of 1965, Public Law 89-74, 89th Congress, H. R. 2.

particularly:

21 U. S. C. 321(v) Appendix-A6, 7 defining depressant and stimulant drugs.

21 U. S. C. 360(a)(c)(f) Appendix-A7 proscribing manufacture and possession; and exemption.

21 U. S. C. 371(a)(e) Appendix-A8, 9 authority for issuance of regulations and provisions for hearings, etc.

Comprehensive Drug Abuse Prevention and Control Act of 1970, Public Law 91-513, 91st Congress, H. R. 18583 carry over of pending proceedings determined under prior (1965) law—21 U. S. C. 321—note—saving provision.

Regulations:

Regulation designating peyote and exempting its religious use:

Commissioner's version—21 C. F. R. 166.3(c)(3).
Director's version—21 C. F. R. 320.3(c)(3).
Both are identical.

Regulation exempting peyote under present law—21 C. F. R. 307.31—Native American Church.

STATEMENT OF THE CASE.

Native American Church. The Native American Church evolved out of the struggle by the American Indians to practice the peyote religion. The Church came into being as a pan-Indian organization to gain First Amendment protection. It was first incorporated in Oklahoma in 1918 by tribal members of the Southern Cheyenne, the Oto, the Ponca, Comanche, Kiowa and Kiow Apache. It is now international in scope, with churches in Canada. It serves the purpose of a very loose confederating body of the local Churches which are incorporated in Arizona, Colorado, Idaho, Iowa, Montana, Nebraska, New Mexico, North Dakota, Oklahoma, South Dakota, Texas, Utah, Wisconsin, and Saskatchewan (Slotkin, "The Peyote Religion", Pages 50-56, 68; Aberle, "Peyote Religion Among the Navaho", Page 19).

The articles of the parent Church direct that members in each tribe "shall each in turn seek recognition in their respective states by applying for charters in accordance with the laws of their respective states, but that the name of the parent corporation shall be the Native American Church of the United States (now North America)" (Slotkin, 56-64; notes on Pages 135-139).

The Church of the Awakening. John and Louisa Aiken, both physicians, began a search for meaning beyond the ordinary when in 1957 there occurred the second of two accidental deaths which took from them both their sons. In their search they gathered to them a small group with similar aims. At this time John Aiken, by chance, read Humphrey Osmond's address before the New York Academy of Science,[1] telling of the transcendent state sometimes consequent on ingestion of substances like peyote and mescaline. This led the Aikens to experiment with peyote to enable greater self-knowledge. They retired from practice in 1963 and have since travelled the country, meeting with people in search of deeper meaning. During the course of their travels, they gave the drug sacrament to about two hundred people the great majority of whom underwent transcendental experiences.[2]

The Church of the Awakening was incorporated by them in October 1963 to provide a structure in connection with their Work. It was the outgrowth of their group associations and with those ministered during their travels. Incorporated into it were the things they had learned from experience of how best to attain the experience of unity with the cosmos, including the peyote sacrament.

Drug Abuse Control Amendments of 1965. Involved here is the Act named[3] the purpose of which was to establish controls for depressant, stimulant and other drugs. Added to Section 201 of the Food, Drug and Cosmetic Act (21 U. S. C. 321), the definition section, was a new subparagraph (v) which defined the substances on which controls were imposed. Barbiturates and amphetemines and their derivatives were named; and a third grouping was made

1. Wherein the term psychedelic was coined: Plaintiffs' Exhibit One. Ann. N. Y. Acad. Science 66; 418.

2. When use of these substances was not proscribed.

3. 79 Stat. 226, 227, July 15, 1965.

by which substances found to be depressant, stimulant or hallucinogenic could be included by regulation. Issuance, amendment and repeal of these regulations was as provided in Section 701 (21 U. S. C. 371) which provides hearing and appeal procedures for the whole Act.[4] The hearing below and appeal to the Ninth Circuit were held and taken under this section; jurisdiction for this Petition is likewise conferred by it (21 U. S. C. 371(e)(4).

A new section 511 (21 U. S. C. 360a) was added. It forbad manufacture, sale or disposal and possession of depressant and stimulant drugs as defined under said subsection (v) of 201, with certain exceptions there spelled out. Subsection (f) of this new section authorized regulations to exempt application of the Act where public health does not require it. These provisions are set forth in the Appendix pp. A6, A7.

History. The bill originated in the House (H. R. 2, 89th Congress). Peyote for religious use was exempted by explicit language: "The Secretary shall not designate . . . peyote (mescaline) but only insofar as its use is in connection with ceremonies of a bona fide religious organization."[5] As the House Report expressed it: "Peyote when used in connection with the ceremonies of a bona fide religious organization . . . could not be designated by the Secretary as depressant or stimulant drugs". (H. R. 130, 89th Congress.)

The Senate omitted this exemption. Its version passed the Senate June 23, 1965. The House concurred in the Senate amendments. In urging concurrence the Chairman of the Committee on Interstate and Foreign Commerce told of deletion of the peyote exemption and of requesting the views of the Food and Drug Administration, "and have been assured that the bill, even wihout the peyote exemption

4. Appendix A8, A9.
5. Appendix A1.

COPY BOUND CLOSE IN CENTER

appearing in the House-passed bill, cannot forbid bona fide religious use of peyote". He read a letter from the Commissioner of Food and Drugs to this effect. Upon such presentation, the House concurred in the Senate amendments which deleted the explicit peyote exemption (Cong. Rec. July 8, 1965 p. 15977). The full text relevant to this presentation is reproduced in the Appendix, pp. A2-A5.

The Regulation, the Amendment Requested and Administrative Proceedings. Immediately upon adoption of the statute, a regulation was promulgated by the Commissioner (21 C. F. R. 166.3(c)(3). The regulation named mescaline, peyote and other substances in alphabetical order as drugs having a potential for abuse. This was in accordance with Subsection (v) of Section 201 (21 U. S. C. 321(v)).

Following the naming of peyote appears this language:

> "The listing of peyote in this subparagraph does not apply to non-drug use in bona fide religious ceremonies of the Native American Church. . . ."

Petitioners sought amendment of this exemption by adding to it the name of the Church of the Awakening following that of the Native American Church.

The Director of the Bureau of Narcotics and Dangerous Drugs replaced the Commissioner of Food and Drugs as the administrator by reason of Executive Order No. 1 of 1968. At such time the identical regulations were reissued by the Director (21 C. F. R. 320.3(c)(3)). The relevant part of the regulation is reproduced. Appendix p. A10.

The Church of the Awakening filed three or four petitions under Section 701(e) with the Commissioner and the Director to add The Church of the Awakening within the exemption. These were peremptorily denied, without even the formalities required by 701(e)(1).

Finally, the *Director* proposed to The Church of the Awakening and the Civil Liberties Union that another like

petition be filed and that hearings be held and evidence taken to the end that there be a ruling as to whether religious use by The Church of the Awakening could be granted.

Over a thousand pages of evidence, and a great many exhibits are in the record below. Joint exhibits are the three monographs on religious use of peyote indexed here.

Order Appealed From. The order of the Hearing Officer, which was affirmed by the Director of the Bureau, is set forth in full in the Appendix, pp. A11-A33. It denies the amendment of the regulation on the grounds (Appendix A27-A29):

(1) "The Church of the Awakening is not a religion in the true sense of the word . . .';

(2) "Peyote obviously is not essential to the existence of the Church of the Awakening, . . . therefore denial of the exemption would not infringe on the rights of the Petitioners to exercise their religion . . .";

(3) "Peyote is an inherently dangerous substance. . . . The Government has direct responsibility and interest in control . . .";

(4) "The Church of the Awakening is generically different from the Native American Church of North America which is sui generis. . . . Without peyote, the religion could not exist and would, in fact, cease to function";

(5) "Both the First and the Fourth Amendment application of the Constitution to the Native American Church . . . is different from the application of those clauses to the members of The Church of the Awakening";

(6) Granting the exemption might permit drug abusers to misuse drugs.

Appeal and Decision There. Appeal was taken to the Ninth Circuit.

The opinion of the Court of Appeals is set forth in full in the Appendix pp. A34-39.

COPY BOUND CLOSE IN CENTER

BASIS FOR FEDERAL JURISDICTION BELOW.

The petition, proceedings and order at the administrative level are predicated upon 21 U. S. C. 371(a) and (e). Jurisdiction of the appeal to the Ninth Circuit was based upon 21 U. S. C. 371(f).

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT AND ARGUMENT.

The Court below has decided an important question of Federal law which has not been but should be settled by this Court; and has decided a Federal question in a way in conflict with the applicable decisions of this Court; and its treatment in such respects compounds the erroneous denial of basic First Amendment rights, so as to call for exercise of this Court's power of supervision.

Where the free exercise clause of the First Amendment fathers a regulation exempting one religious group from the application of a statute and regulation proscribing the use of peyote, does the First Amendment compel like treatment to another bona fide religious group?

A. Introduction and Summary of Argument.

The regulation exempting the religious use of peyote by the Native American Church from application of the Drug Abuse Amendments was founded squarely on the free exercise clause of the First Amendment. Petitioners have contended throughout these proceedings that an exemption to a law founded on and mandated by the free exercise clause of the First Amendment must be construed and administered in light of the equal treatment requirements of the establishment clause. The only question which can be asked of the Petitioners concerns their religiousness: "Is this

religious profession made in good faith?" A positive answer brings the Petitioners within the full coverage of the First Amendment and assures them of equal treatment in the free exercise of privileges guaranteed by the law to the other religious group.

The Director of the Bureau of Narcotics and Dangerous Drugs, in denying the petition, erred in his test of Petitioners' religiousness, and also erred in attempting to distinguish Petitioners from other religious groups. The Ninth Circuit compounded the Director's error by sustaining the Director's denial on issues never briefed or argued, and by deciding these issues erroneously.

B. Exemption of the Native American Church—Congressional Intent and Constitutional Demands.

Congress, by statute, and the Director of the Bureau of Narcotics and Dangerous Drugs, by regulation, explicitly recognize and exempt from proscription the free exercise of the religious use of peyote by members of the Native American Church. The establishment clause of the First Amendment requires equal treatment under all laws touching religious practices. Under the First Amendment a potentially dangerous practice explicitly sanctioned by the government to one religious group must likewise be allowed to all religious groups wishing, in good faith, to make use of the practice.

1. Basis and Nature of the Recognition of Religious Use of Peyote by Members of the Native American Church.

Members of the Native American Church have long made religious use of peyote.[1] In 1962 the Supreme Court of California recognized such usage as one protected by the

1. Slotkin, The Peyote Religion, 50-56; Aberle, The Peyote Religion among the Navaho, p. 19.

COPY BOUND CLOSE IN CENTER

free exercise clause of the First Amendment of the Constitution of the United States. *People* v. *Woody*, 61 Cal. 2d 716, 394 Pac. 2d 813 (1962). Other courts have held to the same effect. *Arizona* v. *Attokai*, No. 4098, Maricopa County, July 26, 1960.

In 1965 Congress set about enacting the Drug Abuse Control Amendments in an effort to name and curb the supply and use of certain dangerous drugs, including peyote. At the same time Congress was aware of the history of religious usage of peyote and of the Court decisions mentioned and wished for the controls enacted to recognize and exempt such First Amendment use of the drug.[2] This recognition and exemption of the protected free exercise practice involved more than simple convenience to the parties involved. Since the supply of peyote would be strictly controlled, only those parties specified as making bona fide religious use of the drug would be afforded legal access to the drug. Thus, although the protected free exercise practice might be absolute, the only means to legal channels of supply would be through the recognition and exemption afforded by the law. Any party not specified could exercise the protected practice only by resort to illicit supply of the drug.

The House version of the amendment contained a specific religious exemption in broad language consistent with the commands of the establishment clause of the First Amendment.[3] The House permitted deletion of the specific exemption from the final measure after assurances had been received from the officer to administer the law that religious use of peyote would be respected.[4]

Unlike the general exemption contained in the statute, the flexibility inherent in the regulation permitted a

2. Appendix, House concurrence in Senate Amendments. Cong. Rec. July 8, 1965, pp. A2-A5.

3. Appendix A1, H. R. 2, House Report 130, 89th Congress.

4. See footnote 2, *Supra*.

specific listing of those found to make good faith, bona fide religious use of the drug. In this manner control and supervision of users could be more precise, and licensed suppliers of the drug could readily determine those eligible, under the exemption, to purchase.

After final passage of the Act, the Commissioner of Food and Drugs (who then administered the law) moved at once to proscribe the use of peyote, but to exempt from this proscription use "in bona fide religious ceremonies by members of the Native American Church", the one group then known by the Commissioner to make such use.[5]

2. Free Exercise License and the Establishment Clause.

The exemption from coverage contained in this statutory and regulatory scheme might be likened to a license to one who passes a qualifying test of religious intent. But regardless of how the free exercise exemption, once recognized, is characterized, the exemption and the procedure for securing it must conform to a parallel First Amendment test—that of even-handed application as compelled by the establishment clause and by the free exercise clause itself. Administration contrary to this test is in error as unconstitutional.

Free Exercise and Prior Restraint. The freedom of religion provision of the First Amendment reads: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." The second, or free exercise, clause appears as a self-executing negative: "Congress shall make no law . . . prohibiting the free exercise [of religion]". The same prohibition can be stated positively as well: "Laws made by Congress shall recognize and permit the free exercise of religion."

5. Appendix A10, Regulation 21 C. F. R. 166.3 (c)(3). When administration was transferred to the Director, the same Regulation was reissued. 21 C. F .R. 320.3(c)(3).

COPY BOUND CLOSE IN CENTER

The free exercise clause does not, however, protect practices which present a clear and present danger to society. Congress can outlaw such practices even if bona fide religious use is made of them. Such is not the case here, however; and but for this one exception, the free exercise protection of the First Amendment is absolute and self-executing, and all laws passed by Congress must comply with it.

In this case Congress acted to control the use and supply of peyote and other drugs. Congress recognized religious use of peyote as a practice protected by the free exercise clause. Clearly Congress could not properly deny this use, and thus the explicit recognition of the use, on its surface, appears to be of little importance. But more is involved here: the right to peyote practice is meaningless without legal access to the substance used in the practice. The suppliers of the substance were placed under strict control, and could supply only those specified by the law. Thus, the negative command of the free exercise clause commanded that for the law to meet the constitutional test Congress would have to provide a means of drug supply for religious use. This Congress did through the statutory and regulatory exemption scheme here involved.

Ironically, the procedure used by Congress to insure compliance with the free exercise clause raises still another First Amendment problem—that of prior restraint. While prior restraints are common in the case of many constitutionally protected rights (e.g., one wishing to receive welfare may first be held to show himself to qualify; the same with voting) the courts have generally held them invalid with regard to rights protected by the First Amendment, and particularly with regard to the free exercise clause. *Cantwell* v. *Connecticut*, 310 U. S. 296, 305, 306; *Sherbert* v. *Verner*, 374 U. S. 398, 407. The logic of this doctrine is that First Amendment rights are too valuable

to permit restraints such as the requirement for prior approval of their exercise, and that if abuses of the right occur they may be sufficiently prosecuted at a later time.

In this regard Petitioners would have been far more comfortable with a regulation reading: "The listing of peyote in this subparagraph does not apply to non-drug use in bona fide religious ceremonies". Yet Petitioners recognize the exigencies of this situation: Peyote is potentially dangerous to society. Suppliers of the drug must know to whom peyote may be sold. The government must be apprised of those making bona fide use of the drug so that illicit and dangerous usage can be stemmed. In view of these unusual circumstances prior licensing of the religious use right is not obnoxious to the Constitution, and the statutory and regulatory scheme devised by the Congress, so long as it preserves the principal religious safeguards, is a proper vehicle to this end.

When a wrongfully banned free exercise right can be practiced easily, its self-executing nature assures its protection. But when as here, the practice is possible only through means established by Congress, the Courts must be particularly watchful of the way in which the machinery for its preservation is administered. *Sherbert* v. *Verner*, 374 U. S. 398, 407.

Application of a Recognized Free Exercise Practice to Other Religions—Clear and Present Danger and Establishment Clause. When Congress, of its own initiative, acts explicitly to permit a practice, recognizing the free exercise right, the effect of the action is legislative recognition that the practice involves no clear and present danger. As with decisions of this Court, such legislative recognition in a specific instance has general application. In the instant case the Congressional, to say nothing of administrative, recognition that there is no clear and present danger

COPY BOUND CLOSE IN CENTER

in the use of peyote by the Indian members of the Native American Church has like application to all bona fide religious use of peyote, including that of Petitioners.

This rule is particularly true in this instance, where Petitioners have stated their complete willingness to abide by any reasonable procedure to insure against abuse of such usage. (The only safeguard regarding use by the Native American Church is a weak restriction on membership in the Church.)

Questions such as the "centrality" of the practice to the religion have no bearing on the free exercise issue. As the Ninth Circuit stated here with regard to centrality: "We cannot say that the Government's interest in a church member's health increases or diminishes depending upon whether his ingestion of a dangerous drug is of greater or lesser importance in the religious ceremonies of his church." *Kennedy* v. *Bureau of Narcotics and Dangerous Drugs*, Appendix—A36. It follows that a free exercise exemption once given to one religion cannot be denied to another, and that the free exercise clause commands that the officer administering the statute in question extend the exemption to all who satisfy the test of bona fide religious intent.

The same result follows under the establishment clause of the First Amendment: "Congress shall enact no law for the establishment of a religion. . . ." This clause is the equal treatment command of the First Amendment. In its practical application it means that the laws of Congress must favor or restrict all religions equally, for to favor one and not another amounts to the establishment of the one so favored. Thus those charged with administering the law are barred from lending it other than an even-handed interpretation. *Fowler* v. *Rhode Island*, 345 U. S. 67, 69; *Niemotko* v. *Maryland*, 340 U. S. 268, 272, 273; *Everson* v. *Board of Education*, 330 U. S. 1, 15; *Braunfeld* v. *Brown*, 366 U. S. 599, 607; *Torcaso* v. *Watkins*, 367 U. S.

492, 493; *Abington School Dist.* v. *Schemp*, 374 U. S. 203, 216; *Sherbert* v. *Verner*, 374 U. S. 398, 404.

When, as here, the law in question gives voice to a free exercise right by means of a complex apparatus, it is especially important that its application be even-handed. The equal treatment assurance of the establishment clause commands that the officer administering the statute extend the right to the practice to all who satisfy the test of bona fide religious intent so that the establishment of an arbitrarily approved religion does not result. Here no problem was encountered so long as the Native American Church was the only such bona fide group known to the officer. With the presentation of the instant petition and the showing of bona fides, however, the Constitution demanded equal treatment for members of The Church of the Awakening.

Again, such questions as "centrality" of the practice, and as cultural and historical differences between those wishing to make use of the practice do not apply.[6] The only factual question which may be asked of one regards religious intent: "Does one make good faith religious use of the practice?" Here the Constitution demands that a finding of this requisite good faith compels the administrative officer to include Petitioners among the licensees.

C. Director of the Bureau.

In denying the petition of The Church of the Awakening, the Director of the Bureau of Narcotics and Dangerous Drugs sought to distinguish Petitioners from the Native American Church.[7] First it was held that The Church of

6. *United States* v. *Ballard*, 322 U. S. 78, 86, 87; *Fowler* v. *Rhode Island*, 345 U. S. 67, 69.

7. The Director also made certain findings regarding the dangerous nature of peyote and the need for inclusion of peyote among the listing of substances with a potential for abuse. (Appendix—A28) These findings form the basis of the inclusion of peyote in the regulation and have no relevance to the First Amendment relief sought.

COPY BOUND CLOSE IN CENTER

the Awakening is not really a religious group. Secondly it was held that even if the Church were a religion it can be distinguished from the Native American Church in other significant ways. Because of these distinctions, it appears that the Director believed that the requirements of the First Amendment did not apply.

On the question of the "religiousness" of the Petitioners, the Director conceded the good faith of the members of The Church of the Awakening and of their use of peyote (Appendix A17), but held that something more than good faith was needed to meet the constitutional test of a religion (Appendix A27). On argument before the Ninth Circuit, however, the government conceded that The Church of the Awakening was indeed a religion. The Ninth Circuit below reversed the Director by holding that the Petitioner was a religion and that it desired to make use of peyote in bona fide religious ceremonies (Appendix A36).

To justify the second division of his holding—that there are constitutionally significant differences between the two churches—the Director relied on three theories. The first was that peyote is more "central" to the Native American Church than it is to Petitioners. The second was that there are important cultural differences between members of the two churches, and the third was that Indians are classified differently from non-Indians under the Constitution (Appendix A28, A29). These points were briefed and argued before the Ninth Circuit, and the Director was reversed on the law in each instance (Appendix A37).

Thus, the Director was reversed on each of the First Amendment points upon which he based his denial of the petition of The Church of the Awakening.

D. The Ninth Circuit.

The Ninth Circuit reversed the Director on every distinction he had relied upon to justify the denial to Petitioners

of the First Amendment right to use peyote. *Yet the denial of the petition by the Director was sustained!* The Court compounded the error and difficulty of the case by holding as it did on issues never raised, briefed or argued by Petitioners or the government. This ultimate conclusion sustaining the Director was reached as the result of a non sequitur; it was in error, and served to uphold an unconstitutional ruling at the expense of a valid regulation.

1. **Reversal of the Director.** The Ninth Circuit held that The Church of the Awakening was a legitimate church whose members had made and desired to make bona fide religious use of peyote (Appendix—A36). The Court also held unimportant the differences between The Church of the Awakening and the Native American Church which the Director thought to distinguish the two for First Amendment purposes (Appendix—A36). Thus, for constitutional purposes, the Ninth Circuit viewed the two churches as the same.

Yet the Court sustained the Director in his denial of the petition by which the members of The Church of the Awakening had sought explicit recognition of their First Amendment rights similar to those already enjoyed by their sister church.

2. **Misstatement of Case.** In doing so the Ninth Circuit misstated the primary contention of The Church of the Awakening. The Church argued that the Director acted in violation of the First Amendment of the Constitution in denying the Church's petition for inclusion in the regulation explicitly recognizing and permitting the right to use peyote. The Court stated, however, that the substance of the Church's contention was "that section 320.3(c)(3) violates the due process clause of the Fifth Amendment because it creates an arbitrary classification . . ." (Appendix—A35). Neither the Petitioners nor the govern-

COPY BOUND CLOSE IN CENTER

ment had raised, briefed or argued the Fifth Amendment equal protection issue. Yet the Court sustained the Director strictly on this basis.

3. **Error in Holding.** The Court held as unconstitutionally arbitrary the regulation by which the free exercise use of peyote by the Native American Church was explicitly recognized and permitted (Appendix—A36). The Court further held that to open this arbitrary class to admit a few more members would not cure the Constitutional defect:

> "As petitioners would amend the regulation, it would create one classification for its church and the Native American Church, both of which would be exempt, and a second classification for all other churches that use peyote in bona fide religious ceremonies, which would be non-exempt. The new classification fares no better constitutionally than the old one." (Appendix—A37)

Thus, the Director's order denying the petition was affirmed. This holding is gross error.

Arbitrary Classification. As detailed above, Congress desired to proscribe the use of peyote, a drug thought to have a potential for abuse. At the same time Congress wished to honor the free exercise clause of the First Amendment by exempting from application the religious use of peyote. This it chose to do by regulation, and the administrative officer—first the Commissioner and then the Director—moved to exempt the members of the one group known to him to make bona fide religious use of the drug. Though the Commissioner had focused on the Native American Church there is nothing in the legislative history to suggest that Congress intended only for that Church to enjoy the religious exemption (Appendix—A4 and A3). The statute provided machinery to amend the regulation to include other bona fide religious uses (Appendix—A8, A9).

Thus, initially the regulation took on the character of a listing of licensees who had passed a preliminary showing of bona fides in religious use of the drug. While this characterization raises questions, already explored, under the First Amendment doctrine of prior restraint, there is nothing at this point to suggest the arbitrariness found by the Ninth Circuit.

Such was the belief of the petitioning members of The Church of the Awakening in addressing their petition, and of the Director of the Bureau of Narcotics and Dangerous Drugs in considering it. Had the petition been granted upon a showing of bona fides, no question of arbitrariness would have arisen, for the result would have shown that the exemption was construed by the Director as open to all such petitioners upon a showing of bona fides. In fact, a result not wholly dissimilar actually occurred: the petition was denied, but on bases which attempted to distinguish the two churches for First Amendment purposes (i.e., that Petitioners did not make "religious" use; and if they did their use could be distinguished). Had these distinctions been valid, the exemption to the Native American Church would still not be an arbitrary one. At this point Petitions appealed and argued that the Director's interpretation of the law and his denial of the petition were unconstitutional *acts* under the First Amendment—that the Constitution demanded that recognition of the free exercise right be afforded Petitioners by the Director.

The Ninth Circuit agreed that the factual distinctions drawn by the Director were without legal basis—that the Petitioners indeed made bona fide religious use of peyote. This holding should have led to a reversal of the Director and the inclusion of the Petitioners among the exempted users. This result would have precluded the taint of arbitrariness. But the Court followed this first holding with a non sequitur: that the invalidity of the Director's dis-

COPY BOUND CLOSE IN CENTER

tinctions meant that the classification for the Native American Church was arbitrary; that the regulation was therefore void; and that the Director was therefore sustained! *It was the very act of the Court in sustaining the Director's denial, after the initial finding on the distinctions, which lent to the regulation an arbitrary character!*

Prior Restraint. It appears that the Ninth Circuit was actually concerned about the First Amendment doctrine of prior restraint rather than with the doctrine of arbitrary classifications. Its refusal to give explicit treatment to the First Amendment claims of Petitioners (Appendix—A37), however, kept it from meeting this problem squarely. The procedure of prior licensing of a right, as used here, results in the exempt and non-exempt classes which so bothered the Court (Appendix—A37). This resulting classification is clearly not arbitrary if all users may enter the exempt class on a showing of bona fides. And since the system of prior restraint is essential, both in guarding the constitutional right to use peyote and in preventing serious and dangerous abuse of such use, no basis for holding the regulation unconstitutional exists.

Thus, the Ninth Circuit erred in sustaining the Director. The only hint of arbitrariness in the regulation was that interjected by the Ninth Circuit. The only constitutional wrongdoing was that of the Director in refusing to extend the exemption from the drug law to The Church of the Awakening. The Ninth Circuit, in discovering that the Director had refused the petition on the basis of legally invalid distinctions, should have reversed the Director. Its actual holding ignored Congress' intent to guard valuable rights, upheld the Director's unconstitutional action at the expense of a valid law, and deprived the petitioning citizens of their sacred constitutional rights.

CONCLUSION.

In case the question occurs to the reader, a savings clause in the current law makes effective judicial determinations arising under the former statute. The relevant provisions are set forth at Appendix A40. The same exemption regulation exists under the present statute.

For the reasons set forth, a Writ of Certiorari is prayed to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

ROBERT J. BURDETT,
ROBERT J. BURDETT, JR.,
Bankers Building—Suite No. 2220,
105 West Adams,
Chicago, Illinois 60603,
Phone: (312) 641-0488,

DALE B. DILTS,
6022 Constitution, N. E.,
Albuquerque, New Mexico,
Phone: (505) 265-7538,

BRUCE M. GLEASON,
8155 Van Nuys Boulevard,
Panorama City, California 91402,
(213) 873-5980,

Attorneys for Petitioners.

September 18, 1972.

INDEX TO APPENDIX.

PAGE

House Version Drug Abuse Control Amendments of 1965—H. R. 2 ..... A1

House Concurrence with Senate of H. R. 2 .....A2-A5

Letter From Commissioner of Food and Drugs A4

Drug Abuse Control Amendments of 1965, As Adopted—

21 U. S. C. 321 (v) A6, A7

21 U. S. C. 360 (a) (a) (c) (f) A7

Federal Food, Drug and Cosmetic Act—

Issuance and Procedure on Regulations—

21 U. S. C. 371 (a) and (e) A8, A9

Regulation—Pursuant to Drug Abuse Control Act Naming Peyote and Exempting Native American Church—

21 C. F. R. 320.3 (c) (3) and 21 C. F. R. 166.3 (c) (3) A10

Order of Director A11-A33

Opinion—Court of Appeals, Ninth Circuit 459 F. 2d 415-418 .....A35-A39

Comprehensive Drug Abuse Prevention and Control Act of 1970, Sec. 702 (c)—Savings Provisions (21 U. S. C. 321, note—savings provisions) A40

Regulation—Continuing Exemption of Native American Church under Current Law—21 C. F. R. 307.31 A40

COPY BOUND CLOSE IN CENTER

APPENDIX.

DRUG ABUSE CONTROL AMENDENTS OF 1965, HOUSE VERSION, H. R. 2 FROM HOUSE REPORT 130, 89TH CONGRESS, P. 35.

(v) The term "depressant or stimulant drug" means—

(1) any drug which contains any quantity of (A) barbituric acid or any of the salts of babituric acid; or (B) any derivative of barbituric acid which has been designated by the Secretary under section 502(d) as habit forming;

(2) any drug which contains any quantity of (A) amphetamine or any of its optical isomers; (B) any salt of amphetamine or any salt of an optical isomer of amphetamine; or (C) any substance which the Secretary, after investigation, has found to be, and by regulation designated as, habit forming because of its stimulant effect on the central nervous system; or

(3) any drug which contains any quantity of a substance which the Secretary, after investigation, has found to have, and by regulation designates as having, a potential for abuse because of its depressant or stimulant effect on the central nervous system or its hallucinogenic effect; except that the Secretary shall not designate under this paragraph, or under clause (C) of subparagraph (2), (A) any substance that is now included, or is hereafter included, within the classifications stated in section 4731, and marihuana as defined in section 4761, of the Internal Rvenue Code of 1954 (26 U. S. C. 4731, 4761, or **(B) peyote (mescaline) but only insofar as its use is in connection with the ceremonies of a bona fide religious organization.**

The provisions of subsections (e), (f), and (g) of section 701 shall, subject to the provisions of section 511(g), relating to advisory committees, apply to and govern proceedings for the issuance, amendment, or repeal of regulations under subparagraph (2)(C) or (3) of this paragraph.

(The bold face material is that deleted by Senate Amendments, concurred in by the House, see Appendix, next page).

APPENDIX.

HOUSE CONCURRENCE WITH SENATE ON H. R. 2, 89TH CONGESS JULY 8, 1965 CONGRESSIONAL RECORD—HOUSE 15977.

TO ESTABLISH CONTROLS FOR DEPRESSANT AND STIMULANT DRUGS.

Mr. Harris. Mr. Speaker, I ask unanimous consent to take from the Speaker's desk the bill (H. R. 2) to protect the public health and safety by amending the Federal Food, Drug, and Cosmetic Act to establish special controls for depressant and stimulant drugs and counterfeit drugs, and for other purposes, with Senate amendments thereto, and concur in the Senate amendments.

The Clerk read the title of the bill.

The Clerk read the Senate amendments, as follows:

• • • • •

Page 3, line 21, strike out all after "4761)" down to and including "organization" in line 23.

• • • • • •

The Speaker. Is there objection to the request of the gentleman from Arkansas?

Mr. Springer. Mr. Speaker, reserving the right to object, I would expect the chairman of the committee, the gentleman from Arkansas [Mr. Harris] to give an explanation of the amendments.

Mr. Harris. Mr. Speaker, if the gentleman will yield, I shall be glad briefly to explain.

Mr. Speaker, the Senate amendments to H. R. 2, the Drug Abuse Controls Amendments of 1965, make three changes in that bill.

The bill provides greater controls over depressant and stimulant drugs and makes possession of these drugs outside of the legitimate channels of trade a criminal offense, except if the possession is for the personal use of the pos-

sessor or a member of his household, or for administration to an animal owned by him or a member of his household.

• • • • •

The last amendment of substance made by the Senate deletes the provision of the House bill which provided that the term "depressant or stimulant drug" does not include peyote used in connection with ceremonies of a bona fide religious organization.

Some concern has been expressed to many of the religious groups affected, and by certain civil liberties organizations concerning the possible impact of this amendment on religious practices protected by the first amendment to the Constitution.

Two court decisions have been rendered in this area in recent years. One, a decision by Judge Yale McFate in the case of *Arizona* v. *Attakai*, No. 4098, in the superior court of Maricopa County, Phoenix, Ariz., July 26, 1960; and a California decision, People against Woody, decided August 24, 1964, in the Supreme Court of California. Both these cases held that prosecutions for the use of peyote in connection with religious ceremonies was a violation of the first amendment to the Constitution.

In view of all this, I requested the views of the Food and Drug Administration and have been assumed that the bill, even with the peyote exemption appearing in the House-passed bill, cannot forbid bona fide religious use of peyote.

Mr. Speaker, I ask unanimous consent to include the letter from the Food and Drug Administration at this point in my remarks.

The Speaker. Is there objection to the request of the gentleman from Arkansas?

There was no objection.

The letter referred to is as follows:

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE,
FOOD AND DRUG ADMINISTRATION,

Washington, D. C., July 2, 1965.

Hon. OREN HARRIS,
Chairman, Committee on Interstate and Foreign Commerce,
House of Representatives,
Washington, D. C.

DEAR MR. CHAIRMAN: In response to your request we are stating the position the Food and Drug Administration expects to take if H. R. 2 becomes law as it passed the Senate with respect to the use of peyote in religious ceremonies.

We have been advised by a representative of the North American Church that this church is a bona fide religious organization and that peyote has bona fide use in the sacrament of the church. The representative has agreed to document both of these statements.

If the church is a bona fide religious organization that makes sacramental use of peyote, then it would be our view that H. R. 2, even without the peyote exemption which appeared in the House-passed version, could not forbid bona fide religious use of peyote. We believe that the constitutional guarantee of religious freedom fully safeguards the rights of the organization and its communicants.

Sincerely yours,

GEORGE P. LARRICK,
Commissioner of Food and Drugs.

Mr. Harris. Mr. Speaker, in view of the foregoing, I recommend that the House agree to the Senate amendments to H. R. 2.

* * * * *

Mr. Springer. Mr. Speaker, I believe the Senate amendments have resulted in the best compromise that we could get. The amendments should be accepted.

Mr. Speaker. I withdraw my reservation of objection.

The Speaker. Is there objection to the request of the gentleman from Arkansas?

There was no objection.

The Senate amendments were concurred in.

A motion to reconsider was laid on the table.

APPENDIX.

DRUG ABUSE CONTROL AMENDMENTS OF 1965.

79 Stat. 266, 227

Text of relevant provisions as adopted.

Subsection (v) Section 201 (21 U. S. C. 321 (v)):

(v)[1] The term "depressant or stimulant drug" means—

(1) any drug which contains any quantity of (A) barbituric acid or any of the salts of barbituric acid; or (B) any derivative of barbituric acid which has been designated by the Secretary under section 502(d) as habit forming;

(2) any drug which contains any quantity of (A) amphetamine or any of its optical isomers; (B) any salt of amphetamine or any salt of an optical isomer of amphetamine; or (C) any substance which the Secretary, after investigation, has found to be, and by regulation designated as, habit forming because of its stimulant effect on the central nervous system; or

(3) any drug which contains any quantity of a substance which the Secretary, after investigation, has found to have, and by regulation designates as having, a potential for abuse because of its depressant or stimulant effect on the central nervous system or its hallucinogenic effect; except that the Secretary shall not designate under this paragraph, or under clause (C) of subparagraph (2), any substance that is now included, or is hereafter included, within the classifications stated in section 4731, and marihuana as defined in section 4761, of the Internal Revenue Code of 1954 (26 U. S. C. 4731, 4761).

The provisions of subsections (e), (f), and (g) of section 701 shall apply to and govern proceedings for the issuance,

1. Section 201(v) effective July 15, 1965.

amendment, or repeal of regulations[2] under subparagraph (2)(C) or (3) of this paragraph.

New Section 511, Subsections (a), (c) and (f). Proscriptions and exemptions (21 U. S. C. 360a).

DEPRESSANT AND STIMULANT DRUGS

SEC. 511 [360a]. (a) No person shall manufacture, compound, or process any depressant or stimulant drug, except that this prohibition shall not apply to the following persons whose activities in connection with any such drug are solely as specified in this subsection:

* * * * *

(c) No person, other than a person described in subsection (a) or subsection (b)(2), shall possess any depressant or stimulant drug otherwise than (1) for the personal use of himself or of a member of his household, or (2) for administration to an animal owned by him or a member of his household.

* * * * *

(f)(1) The Secretary may by regulation exempt any depressant or stimulant drug from the application of all or part of this section when he finds that regulation of its manufacture, compounding, processing, possession, and disposition, as provided in this section or in such part thereof, is not necessary for the protection of the public health.

2. F. D. C. Regs., part 166.

APPENDIX.

FEDERAL FOOD, DRUG AND COSMETIC ACT.

Administrative procedures applied to drugs added by regulation under new subsection (v) to Section 201 (21 U. S. 321 v).

Section 701 (a) and (e)—Regulations and Hearings 21 U. S. C. 371(a), (e).

REGULATIONS AND HEARINGS

SEC. 701 [371]. (a) The authority to promulgate regulations for the efficient enforcement of this Act, except as otherwise provided in this section, is hereby vested in the Secretary.

* * * * *

(e)(1) Any action for the issuance, amendment, or repeal of any regulation under section 401, 403(j), 404(a), 406, 501(b), or 502(d) or (h) of this Act shall be begun by a proposal made (A) by the Secretary on his own initiative, or (B) by petition of any interested person, showing reasonable grounds therefor, filed with the Secretary. The Secretary shall publish such proposal and shall afford all interested persons an opportunity to present their views thereon, orally or in writing. As soon as practicable thereafter, the Secretary shall by order act upon such proposal and shall make such order public. Except as provided in paragraph (2), the order shall become effective at such time as may be specified therein, but not prior to the day following the last day on which objections may be filed under such paragraph.

(2) On or before the thirtieth day after the date on which an order entered under paragraph (1) is made public, any person who will be adversely affected by such order if placed in effect may file objections thereto with the Secretary, specifying with particular-

ity the provisions of the order deemed objectionable, stating the grounds therefor, and requesting a public hearing upon such objections. Until final action upon such objections is taken by the Secretary under paragraph (3), the filing of such objections shall operate to stay the effectiveness of those provisions of the order to which the objections are made. As soon as practicable after the time for filing objections has expired the Secretary shall publish a notice in the Federal Register specifying those parts of the order which have been stayed by the filing of objections and, if no objections have been filed, stating that fact.

(3) As soon as practicable after such request for a public hearing, the Secretary, after due notice, shall hold such a public hearing for the purpose of receiving evidence relevant and material to the issues raised by such objections. At the hearing, any interested person may be heard in person or by representative. As soon as practicable after completion of the hearing, the Secretary shall by order act upon such objections and make such order public. Such order shall be based only on substantial evidence of record at such hearing and shall set forth, as part of the order, detailed findings of fact on which the order is based. The Secretary shall specify in the order the date on which it shall take effect, except that it shall not be made to take effect prior to the ninetieth day after its publication unless the Secretary finds that emergency conditions exist necessitating an earlier effective date, in which event the Secretary shall specify in the order his findings as to such conditions.

APPENDIX.

21 C. F. R. 320.3(c)(3), REGULATION DESIGNATING PEYOTE AND EXEMPTING RELIGIOUS USE—DIRECTORS' VERSION—(IDENTICAL TO EARLIER COMMISSIONER'S VERSION 21 C. F. R. 166.3(c)(3)).

Federal Register, Vol. 33, No. 193—
Thursday, October 3, 1968

(c) The Director has investigated and designates all drugs, unless exempted by regulations in this part, containing any amount of the following substances as having a potential for abuse because of their:

(1) Depressant effect on the central nervous system:

Established name or other nonproprietary designation	*Some trade and other names*
Chloral betaine—	Beta-Chlor.
Chloral hydrate—	Chloral.
• • • • •	
Mescaline and its salts.	
Peyote.	
Psilocybin; psilocibin.	
Psilocyn; psilocin—	

The listing of peyote in this subparagraph does not apply to nondrug use in bona fide religious ceremonies of the Native American Church; however, persons supplying the product to the Church are required to register and maintain appropriate records of receipts and disbursements of the article.

• • • • •

COPY BOUND CLOSE IN CENTER

APPENDIX—ORDER BY DIRECTOR.

DEPARTMENT OF JUSTICE
Bureau of Narcotics and Dangerous Drugs
DEPRESSANT AND STIMULANT DRUGS
Use of Peyote for Religious Purposes

Findings of fact and conclusions and orders regarding the petition of the Church of the Awakening to amend § 320.3 (c)(3).

In the matter of the petition of the Church of the Awakening to amend § 320.3(c)(3):

Petitioner's amendment would grant the Church an exemption to use peyote for religious purposes. A hearing was held on this matter before Mr. Frederick M. Garfield from June 30, 1969, through July 9, 1969. The report, findings of fact, conclusions, and recommendations of the hearing examiner follow in their entirety:

In the matter of: Petition of the Church of Awakening to amend 21 CFR 320.3(c)(3).

The Church of the Awakening first petitioned the Food and Drug Administration on May 17, 1967, under the Drug Abuse Control Amendments of 1965 for an exemption to use peyote for religious purposes. This petition was denied by the Commissioner of the Food and Drug Administration on July 10, 1967. On January 11, 1968, the Church again petitioned the Food and Drug Administration for an exemption. This petition was also denied.

On May 15, 1969, the Director of the Bureau of Narcotics and Dangerous Drugs[1] received a petition from the Church of the Awakening, declared to be a New Mexico corporation, Dr. John W. Aiken of Socorro, N. Mex., President of the Church, and 13 members of the Church, as copetitioners to amend § 320.3(c)(3) of Title 21 of the Code of the Federal Regulations. The purpose of the petition is to obtain an exemption for the said Church to permit them the nondrug

See footnotes at end of document.

use of peyote in bona fide religious ceremonies. Notification of the submission of this petition was published in the FEDERAL REGISTER on June 26, 1969 (34 F. R. 9871).

On June 11, 1969, Dr. John Aiken, and Mr. John Adams of the American Civil Liberties Union, met with members of the Chief Counsel's Office of the Bureau of Narcotics and Dangerous Drugs and arranged a mutually convenient procedure by which the Church could petition for an exemption and also make a record containing the necessary facts should an appeal to the courts be necessary.

A prehearing conference was held by the Hearing Officer on June 30, 1969, at which time a record was made of the proceedings. During this prehearing conference, it was established that the particular section in question was erroneously cited, i.e., Petitioners brought the action pursuant to section 701(e)1(b) of the Federal Food and Drug Act to amend § 166.3(c)(3) of Title 21 of the Code of Federal Regulations whereas this regulation is now designated as 21 CFR 320.3(c)(3). Other matters were discussed as to the conduct of the hearing. It was agreed that while this hearing was informal, a record would be made and the record would be used in lieu of a separate public hearing in the event of a request for a court review.

The hearing began on June 30, 1969, and ended on July 9, 1969. A transcript of the testimony, 926 pages, sets forth the testimony of seven witnesses on behalf of the Government and 10 witnesses on behalf of the Petitioner. Additionally, four depositions were taken between June 18, 1969, and June 25, 1969, consisting of some 280 pages. Nineteen exhibits were introduced into evidence on behalf of the Government and 26 were introduced by the Petitioner. Briefs were filed by the Petitioner and the Government.

The Drug Abuse Control Amendments of 1965 were passed by the House of Representatives on March 10, 1965. The Senate passed its version on June 23, 1965. On July 8, 1965, the House concurred in the Senate's amendments and the Bill was signed into law by the President on July 15, 1968. (sic) It is vital to note in this respect that the Senate report differed significantly from the House report in that

See footnotes at end of document.

COPY BOUND CLOSE IN CENTER

it said "the Committee determined that it would not be desirable to specify drugs other than barbiturates and amphetamines as subject to the controls of the Bill, but determine that the other classes of drugs are to be brought under control of the Bill on a case by case basis by the Secretary of Health, Education, and Welfare under the standards prescribed in the legislation. In accordance with this determination, the Committee omitted specific reference to peyote as a substance subject to the provisions of the legislation. It is expected that peyote will be subject to the same consideration as all other drugs in determining whether or not it should be included under the provisions of the legislation."

Basis for petition. Subsequent discussions and inclusions in the Congressional Record as elucidated in Petitioner's own brief indicate that the exclusion of peyote from the legislation focused only on the Native American Church. Section 320.3 of title 21 specifically lists peyote and mescaline and salts of mescaline as being controlled drugs. The law also states:

> The listing of peyote in this subparagraph does not apply to nondrug use in bona fide religious ceremonies of the Native American Church: however, persons supplying the product to the Church are required to register and maintain appropriate records of their receipts and disbursements of the article.

Petitioners, in fact, seek an amendment to this section. They propose that the above text read as follows:

> The listing of peyote in this subparagraph does not apply to nondrug use in bona fide religious ceremonies of the Native American Church and of the Church of the Awakening: • • •

The Grounds upon which the Petitioners rely for the proposed amendment is as follows:

> The use of peyote by members of the Church of the Awakening in pursuance of precepts of said Church and under the provisions of its authorized personnel is in bona fide pursuit of a religious faith.

See footnotes at end of document.

In the petition it is alleged that:

The Church of the Awakening has a present national membership of approximately 390. It is an outgrowth of a group formed in 1958 in New Mexico for the purpose of religious study. It was incorporated in 1963 by members of said group as a nonprofit religious corporation under the laws of the State of New Mexico.

In 1960, the sacramental use of peyote was found by said group to be valuable for the actualizing of the user's religious or spiritual potential. After said Church was incorporated, the use of peyote was named as a sacrament of the Church.

It is further alleged that:

The religious sacramental use of peyote has been carried on by the members of said group since 1960 and by members of said Church since 1963. A number of members of the Church, including the individual petitioner signing this petition and the co-petitioners joining in this petition have bona fide beliefs and convictions that the partaking and ingestion of peyote as a sacrament, according to the precepts of said Church, is valuable for the actualizing of their respective religious and spiritual potential, and they have a desire to use peyote for such purpose, but are prevented from doing so by reason of the regulations, amendment of which is sought by said petition. For such reason the regulation as now promulgated defeats the immunity given such use by the First Amendment of the Constitution of the United States.

From John W. Aiken's affidavit accompanying the petition the following is abstracted:

The Church of the Awakening is a New Mexico corporation, incorporated on October 14, 1963 as an outgrowth of a group of people who began meeting weekly in Socorro, N. Mex., for the purpose of religious or spiritual exploration. This group began by exploring the field of extrasensory perception and psychic phenomena. Petitioner and others began to experiment with the use of peyote and believed it to be the door to the inner-life of the spirit. Most

See footnotes at end of document.

of such religious explorations were done with peyote, but later mescaline was used in the same way with comparable results. After these initial experiments and alleged revelations, the Church of the Awakening was granted a charter by the State of New Mexico on October 14, 1963 as a non-profit religious organization.

The bylaws of said Church provide that if other substances, in addition to peyote, with similar properties were found to be useful in the development of religious insight and experience, they might also be used, if this use is legal. The explicit purpose of the Church of the Awakening is to encourage spiritual growth on the part of each member to stimulate him to ask questions, to develop insights, and to encourage the sharing of such growth and insights with others in love and service. Each is encouraged to participate in his own spiritual growth and his own evolution. It is a precept of the Church that such growth and such evolution is the true purpose of all religion—in fact that such growth is religion.

Inner-growth or learning and service and sharing can be encouraged in traditional ways, but should be without the traditional bondage to approved forms and rituals. Inner-growth and learning is encouraged by the study of the writings of sages and mystics. Group meetings at regular intervals is another very important and useful means in the process of growth. In such group activity, two practices are of great importance. One is sharing through discussion and the other sharing through silent meditation. Both should be practiced, but of the two, meditation has the greater potential for the stimulation of individual growth and understanding.

The Church purposes are further encouraged through individual and group participation in the ingestion of peyote. This substance is to be administered to those who have been previously prepared and by those who are certified monitors of the Church.

At this point in the petition, Dr. Aiken goes into a dissertation on the procedure of the preparation for the peyote ingestion. This procedure was changed during the hearing

See footnotes at end of document.

and will be discussed in depth later. The petition also states that it is the earnest desire of the Church and its officials to make available to members the tremendous potential for achieving a deep religious experience through the peyote sacrament and to protect members and the public from the hazards of improper use.

Government's theory of case. The Government recognizes in its brief that a balancing test is required wherein the free exercise of religion is weighed against the multifaceted governmental interest. The Government alleges that the importance of the religious practice abridged in the instant case is minimal within the petitioners' own framework; that the denial of the petitioners' request will not seriously interfere, if at all, with the practice of their religion, if indeed, a religion it be; that the Government has an overriding interest in controlling the use of peyote and other hallucinogenic drugs; that the present scheme of regulation is necessary to protect the public health; and, finally that an exemption such as the one requested in the instant case would have a disastrous effect on the overall program of dangerous drugs regulation. In particular, the Government claims that the proposed use of peyote by the petitioners is not "essential" nor "central" to the religion, and the denial of such use would not constitute an infringement on the petitioners' constitutional right to exercise their religion.

From the outset, the Government claims that the Church of the Awakening is not a religion. It maintains that the petitioners are religious, but their practices do not constitute a religion. Going further, the Government maintains that the denial of the petition would not prevent the practice of the petitioners' religion. Expanding the original concept, the Government maintains that it has a legitimate and compelling interest in regulating the use of peyote a drug shown to have a potential for abuse because of its hallucinogenic effect. The Government reasons that an examination of the evidence produced during the hearing shows the necessity for controlling dangerous substances, including peyote, and that the public interest weighs heavier

---

See footnotes at end of document.

COPY BOUND CLOSE IN CENTER

in the balance than the alleged interference with the Church's religious practices.

The Government further shows that elaborate measures have been enacted to control the use of dangerous drugs. This is based on the philosophy that drugs must be shown safe and effective before they can be made available to the public, and even if they have been found effective they must be subjected to further controls according to their danger and potential for abuse. Some drugs have been shown to be dangerous physically and psychologically to the user and thus possess a potential for abuse. This, the Government says, presents a danger for the hallucinogens sufficient in itself to preclude granting the amendment. Whenever medical science can demonstrate that a religious practice is harmful to public health and not merely personal health, that practice rather than the belief can be prohibited without violating the constitutional guarantee of freedom of religion. The Government does not question the sincerity of the petitioning members of the Church of the Awakening, but the Government does insist that other individuals using the cloak of religion to use drugs indicate that the problems in enforcing the peyote laws would be overwhelming. The Government also points out that the requirements for membership in the Church of the Awakening are so nebulous that if the petitioners's request for an amendment were granted, there would be no feasible way to control the use or abuse of the drug. In fact, anyone who is able to sign his name to an application can become a member of the Church, use the exemption and claim First Amendment protection as a "shield" for whatever use he may wish to make of the drug. It is pointed out that should such an exemption be granted, the Government would have no way of curtailing the formation of other churches whose sole purpose would be to legalize drug use for their membership.

In pointing out the potential dangers to the individual's physical well-being, the Government lists and explores cellular death, lassitude, premature aging, decreased life span, leukemia, malignancies, and organ toxicities. The potential dangers to offspring include decreased growth rate, leukemia, fetal abnormalities, increased abortions, early abor-

See footnotes at end of document.

tions, infertility and sterility. The dangers to the individual's psyche include psychosis, psychological dependence (including escapes from reality), and abuse due to cultural orientation. Additional dangers include suicides and crimes or harm to other individuals while the user is hallucinating. Symptoms observed are depression and psychotic reactions, including paranoia suspicion "flash backs," catatonic states, lassitude and laziness, confusion and impaired intellectual and psychomotor functions.

By exploring the unique situation of the Native American Church, the Government justifies the regulation allowing its use of peyote on the basis of the traditional legal and cultural status of the American Indians which is "sui-generis" in showing that the peyote sacrament in the Native American Church is different and distinct from that of the Church of the Awakening. The Government alleges the special membership requirements of the Native American Church and the overriding factor that peyote is essential and central to the religion in that without peyote their religion would not and could not exist.

Petitioners' Theory of Case. Petitioners claim that they have shown the use of peyote as a sacrament under the tenants of their church and that the experience engendered with the peyote "sacrament" goes to the very heart of their religion. Petitioners allege that the tenants of the Church are to strive towards the direct experience of God. They conclude "it is not the only way to find God, but it is a most important tool and many people would not find this experience without it."

Petitioners further allege that the peyote sacrament as practiced by the Church of the Awakening requires a serious religious intent. By demonstrating evidence of the beliefs of the petitioner and copetitioners and the religious nature of the ingestion of peyote, it is claimed that inquiry into the validity of such beliefs is not permissible under the First Amendment. They contend that granting an exception to the Native American Church for its religious use of peyote and opposing like use by the petitioner and copetitioners is a violation by the Government of the establish-

See footnotes at end of document.

COPY BOUND CLOSE IN CENTER

ment clause of the First Amendment. Petitioners claim that conceding that the Government may proscribe the religious use of peyote, a case justifying such proscription does not exist here. It is claimed in the area of religious freedom, only the gravest abuses endangering paramount interest give occasion for permissible limitation, and that no such abuse or danger has been advanced in the present case. Petitioners further go on to indicate that the Government's proof of the deleterious effect of these materials is weak and does not justify valid consideration.

Specialized findings of fact. 1. Peyote is the common name of a plant presently classified botanically as Lophorphora Williamsii Lemaire. It is a small, spineless, low growing cactus; carrot- or turnip-like in shape and size. Only the fleshly, rounded top appears above the soil. It is the pincussion-like top which when sliced off and dried becomes the hard, brittle disk shape button. This is the button which is used ceremoniously or otherwise to produce profound sensory and psychic phenomena attributed to peyote. The peyote cactus is native to the region of the Rio Grande Valley and southward.[2]

2. Peyote contains many active alkaloids. The least toxic alkaloid is mescaline.[3] Three other alkaloids are identified as moderately toxic. These are anhalamine, anhalodine and pellotine.[4] The most toxic alkaloids found are anhalonine and lophophorine. For these latter two drugs, 0.0011 grams per kilogram is lethal for frogs.[5] The absolute toxicities of all the alkaloids have not yet been determined.[6] Studies have been made of the effects of these alkaloids individually, but it remains to be determined what the combined effect these substances, as they are found in the peyote button, is, and if there is an interaction of these substances which could produce an effect different from that initiated by each of the drugs used separately.[7] Mescaline is an active substance[8] which is the least of the alkaloids in peyote and is known to constitute approximately 1.5 percent of the weight of the peyote button.[9] Pellotine and anhalonidine have sedative effects. Lophophorine and anhalamine are strong convulsants similar in action to strychnine.[10]

See footnotes at end of document.

3. Peyote is generally distributed in the form of dried buttons.[11] The ultimate dosage form and method of ingestion varies from chewing and ingesting the button to decocting the button to a tea-like liquid to be drunk, grinding the button to a powder to be enclosed in gelatin capsules to ease ingestion, or injecting a solution of the substance into the body.[12]

4. The emetic activity found shortly after ingestion of peyote or mescaline is described to a central effect as opposed to an irritant effect on the lining of the stomach.[13] This effect is not self-limiting because variations in emetic response might not preclude the ingestion of a lethal does.[14] That the lethal dosage in humans is not known is emphatically brought out by petitioner John Aiken, who admits to the lack of scientific knowledge in this area.[15] Vomiting or emisis, a recognized side reaction of ingestion of this drug can be in and of itself inherently dangerous to certain susceptible members of the population—for example, someone suffering from cardiovascular disease.[16]

5. Animal tests with both mescaline and LSD indicate a strong likelihood that ingestion of these substances will lead to fetal abnormalities.[17] Whether this effect is original or cumulative is not yet determined.[18] Initial studies in this area are sufficient, when it comes to the matter of safe-guarding the public health and welfare, to predict the comparability of mescaline to LSD[19] as a teratogenic agent.[20] Because of peyote's accepted status as a hallucinogen and on the basis of submitted evidence that some of the manifestations and characteristics of other hallucinogens are indistinguishable from peyote and because of the relative paucity of conclusive research concerning peyote, it is reasonable to assume that the evidence submitted for other hallucinogens will apply to peyote.[21] It is thus found that the potential dangers to off-spring include decreased growth rate, fetal abnormalities, increased abortions, early abortions, infertility and sterility.[22] Other dangers which are indicated are the possibility of leukemia, lassitude, and decreased life span.[23] The physiological effects of peyote is one of physical and mental exhilaration.[24] At the onset,

See footnotes at end of document.

there is wakefulness, mild analgesia and a sensation of fullness in the stomach or loss of appetite which may lead to active nausea, a feeling of tightness in the chest, some muscular tetany, and heightened sensitivity to sound, color, form and texture. Later phases may include visions or hallucinations.

The paucity with human research conducted with regards to peyote, mescaline and other related hallucinogens has disclosed controversy with respect to short term and long range effects on man.[25] There are indications of harmful, somatic and mutagenic effects.[26] It has been demonstrated that incurable psychosis can be induced because of the use of these drugs under certain situations.[27] It is established that there is no accurate screening procedure which would definitely identify any individual who might be prone to such a psychosis.[28]

6. Peyote is a drug having a hallucinogenic effect within the meaning of 21 U. S. C. 201(V)(3). The criteria applicable to the determination of whether a drug has a hallucinogenic effect is the consideration of whether the substance will produce hallucinations, illusions, delusions, or alteration of any of the following:

1. Orientation with respect to time or place.[29]

2. Consciousness as evidenced by confused states, dreamlike revivals of past traumatic events or childhood memories.[30]

3. Sensory perception as evidenced by visual illusions, synesthesia, distortion of space and perspective.[31]

4. Motor coordination.

5. Mood and affectivity as evidenced by anxiety, euphoria, hypomania, ecstasy, autistic withdrawal.[32]

6. Ideation as evidenced by flight of ideas, ideas of reference, impairment of concentration and intelligence.[33]

7. Personality as evidenced by depersonalization and derealization, impairment of conscience, and acquired social and cultural customs.[34]

There is sufficient indications in the record which conclu-

See footnotes at end of document.

sively establish that peyote is in that class of substances as described above having a hallucinogenic effect.[35]

7. That psychological harm may be precipitated by the ingestion of peyote is manifest.[36] Permanent psychological damage can occur when people have both good or bad "trips."[37] There is potential for personality disintegration and the breakdown of certain mechanisms needed to function effectively in society. With continued use over long periods of time, problems arise in focusing concentration. Memory failure occurs and there is a decrease in mathematical ability. There may occur creeping paranoia or feelings of persecution, exaggerated feelings of self-confidence, or even growing underlying feelings of inferiority. There is exhibited passivity, loss of energy and lack of desire to do things, impulsiveness, and feelings of the futility of life and helplessness about one's future.[38]

8. Up to 5,000 bad trips were noted by one of the witnesses. These bad trips were an immediate unpleasant experience for the subject and were compared to the psychological harm that occurs from the "good trips," in that one who experiences a "good trip" wishes to repeat the performance and may well build a psychological dependence for the continued experiencing of the sensations produced by the drug.[39]

9. There is evidence of subjective correlations of peyote to religious insight and personal psychological and mental gain. These experiences may vary with the conditioning and the set and setting of the individual at the time of ingestion of the drug. These attributes are described by some as unreal and psychedelic hypocracy.[40]

There is no approved medical use of peyote in the United States; however, experimentation with hallucinogens, particularly LSD, is being conducted with terminal patients, alcoholics and others to determine the therapeutic utility.[41] While one report was favorable, the majority of the reports dealing with alcoholics appeared negative for medical value.[42]

10. The set or setting of an area in which the subject is to ingest peyote and the subjects preparation is important

See footnotes at end of document.

COPY BOUND CLOSE IN CENTER

to the immediate or initial outcome precipitated by the ingestion of the drug. It does not, however, guarantee a favorable immediate reaction, but it does lessen the probability of a traumatic experience. Precipitious problems do occur less frequently in such settings, but they do occur."

11. That the administration of peyote must be given under very special circumstances is uncontroverted in the record. The controversy arises as to the particular circumstances themselves. Likewise, the necessity of trained personnel in attendance is unquestioned. The degree of training, however, raises grave conflicts of opinion."

A screening of subjects is necessary before ingestion of the drug to insure that certain types of personalities are rejected. This screening is of a psychological nature. If after the screening and ingestion of peyote a reaction sufficient in intensity requires the termination of the "experience," a physician must first determine the problem, and second, administer the necessary antidote drug, i.e., chlorpromazine, pentothal, or similar type drugs."

The Church of the Awakening requires "monitors, ministers and a physician on call." Ministers and monitors need not possess, according to the petitioners' requirements, the ordinary scholastic and licensing requirements to practice psychology, psychiatry, or medicine, and yet they are expected to make psychological, medical, and psychiatric determinations."

Of the conditions precedent to the appointment of a monitor or minister of the Church, one or more of the listed requirements may be waived by the "Directors."[87]

12. The Church of the Awakening is a loosely formed group incorporated by Drs. John and Louise Aiken for the purpose of studying and developing the spiritual nature of man in order for man to recognize his oneness with the cosmos, and to find purpose and meaning of life. The thing that is most important and fundamental to the beliefs of petitioning Church is the "mystical experience," or the attainment of the goal of "religious experience."[88] It is not

---

See footnotes at end of document.

inconsistent for members to be practicing members of other religious entities or religions.[49]

The Church desires to provide for those who request it, the opportunity to have a psychedelic experience which is a sacrament of the Church. A psychedelic experience is defined as that experience which occurs following the ingestion of peyote or like substances which may be found useful for the purpose of increasing man's understanding of himself.[50] Other psychedelic drugs, if legal and safe, could be used rather than peyote if the latter remains illegal.[51] There is no one single drug which is considered by the Church to be fundamental to its religion.[52]

13. The Church of the Awakening exists today and its members do not partake of hallucinogenic substances.[53] There are members of the Church to whom peyote is non-essential.[54] The one fundamental fact is that the mystical or religious experience is fundamental to the Church and that drugs are not the only means to achieve this end.[55] The mystical experience is achieved more quickly with peyote.[56]

14. The Board of Directors is a loosely knit group with the membership of some of the Board unknown to other members of the Board; likewise, the Board members are not fully knowledgable of the monitors of the Church. There is a clear and distinct possibility that the membership of the Board of Directors can change—that it may change is fact.[57]

15. The sole membership requirement is the filling out of a membership blank which implies the understanding of the objectives of the Church. There is no indication of any means by which a person wanting to become a member of the Church may be denied membership. The precise membership in the Church and their dates of membership have not been determined.[58]

16. There has been no policy established as to the age at which peyote ingestion is to be limited.[59]

17. Sacrament in the Church is described as a sacred experience, not a fundamental something essential for salvation or other religious ends. Sacrament is the sacred ex-

---

See footnotes at end of document.

COPY BOUND CLOSE IN CENTER

perience.[60] The Church believes in the use of any hallucinogen so long as it is legal.[61] There are no medically approved hallucinogens in the United States today.

18. In the attainment of its goal of the religious experience, the requirement for monitors in the Church is extremely flexible and can be changed readily at the will of the Board of Directors.[62] The original requirements as set forth in the petitioners' petition on page 17 et sequitur have been changed as manifested by petitioners' exhibit No. 5 during the course of the hearing. Along with changes in the procedures for the ingestion of peyote, using the latter procedures and qualifications, the sacrament is to be dispensed only at the National Center of the Church of the Awakening (which is not yet existent) under the direct supervision of an ordained minister of the Church.[63]

Competent medical assistance shall be available but not necessarily on hand.[64] A candidate shall have a minimum of a week available for the experience. Two days of preparation are required utilizing meditation, music, relaxation, self-examination and the development of an increased rapport with the minister or certified monitor.[65] Medical assistance shall be nearby (i.e., on call) but not necessarily present during the experience.[66] One day shall be devoted for the experience itself and the 4 subsequent days for orientation in light of new perspectives hoped to be achieved.[67]

19. Group participation may be instituted for those who have previously achieved at least three satisfactory individual experiences. There are no criteria that have been established to indicate what constitutes a satisfactory individual experience or an unsatisfactory one. The group shall have no more than five members—each having a mutually satisfactory rapport with the others, and may be guided or accepted by a single minister on a given day. The minister may not partake of the substance and he shall be assisted by at least one certified monitor or monitor candidate. The latter also shall not partake of the substance.[68]

See footnotes at end of document.

20. The peyote will be available only to those who have been members of the Church for a minimum of 1 year and whose personality and motivation are known to a minister of the Church.[69] After the first experience no member may participate in the experience oftener than three times a year.[70] The subject shall be under supervision for 24 hours after the beginning of the experience.[71]

21. The qualifications and appointment of monitors are as follows: Minimum age, 25 years. Education should include not less than 2 years of college and preferably a bachelor's degree. Personality should be outgoing and capable of developing rapport with a variety of people. He should be oriented towards service rather than profit or status. Experience should include at least five personal individual psychedelic experiences; the observance of five given by a minister or certified monitor; and monitoring five under the supervision of a minister or certified monitor. He may then be recommended to the Board of Directors for certification. The five personal individual psychedelic experiences need not be within the framework of the Church and could definitely include individual nonchurch oriented ingestions of hallucinogens.[72]

22. There are numerous other means to attain the religious experience desired by the petitioners. The experience may be achieved by meditation, fasting, hypnosis, deliberation, and contact with other members of the Church. The Church presently exists utilizing these other methods.[73]

23. Peyote has an entirely different and individual meaning to the members of the Native American Church. It is essential to their religion; it is a deity; it is a subject of worship as well as an instrument of worship and without it, the religion would cease to exist and could not function.[74]

24. Indians in the United States are treated differently from other citizens. Their situation is similar to sovereign nations in that their relationship with the Federal Government is direct and not through a State or other municipal

---

See footnotes at end of document.

COPY BOUND CLOSE IN CENTER

authority. To the Indians on a reservation, there is a separate Bill of constitutional rights, 25 U. S. C. A. 1301 et seq.[75]

25. That mescaline or peyote is abusable and has a ready market among the drug culture throughout the Nation is evidenced by the number of clandestine laboratories which have been discovered by Federal Agents.[76]

Conclusions. While the record of the hearing and the briefs presented by the Church of the Awakening and the Government in this case are voluminous, the issues are relatively clear cut.

1. Do the precepts of the Church of the Awakening constitute a religion?

2. Is the use of peyote or other hallucinogenic drugs essential to the Church in its religious practices?

3. Would the denial of the requested exemption constitute an infringement on the petitioners' rights to exercise their religion?

4. Would the Church's use of peyote pose a substantial risk to health and life, or to the social well-being or the convenience of society?

5. Does the granting of an exemption for the use of peyote to the Native American Church of North America and not to the Church of the Awakening violate the petitioners' constitutional rights?

It is the opinion of the Hearing Officer after review and study of the record that the Church of the Awakening is not a religion in the true sense of the word, but a loose confederation of kindred souls whose purpose is to explore the mystical boundaries of humanity through the use of hallucinogenic drugs and other means.

Peyote obviously is not essential to the existence of the Church of the Awakening. The Church has existed and does exist without the use of the drug. Other means may and are being utilized to achieve the fundamental goals of the Church. Granted, arguendo, that drugs can facilitate or precipitate a religious or mystical experience, the record

See footnotes at end of document.

shows that the experience can be reached through less convenient means such as fasting, prayer, meditation, hypnosis, etc. Therefore, denial of the exemption would not infringe on the rights of the petitioners to exercise their religion. The fact that the Church is functioning and has been functioning since 1965, the year of the enactment of the Drug Abuse Control Amendments, is prima facie evidence that it can exist and function without peyote.

The Government has direct responsibility and interest in the control of certain hallucinogenic drugs under the Drug Abuse Control Amendments of 1965. Peyote has been designated as a drug with a potential for abuse because of its hallucinogenic effect and it is subject to control under the Amendments.

This law was passed by the Congress to improve Federal controls over depressant, stimulant, and hallucinogenic drugs because their illegal manufacture or diversion into the illicit market posed a danger to the public health and safety. The Government's interest for the public welfare is sufficient to override the inconvenience that refusal of the exemption might cause to the petitioners.

Peyote is an inherently dangerous substance capable of producing psychosis and other psychological harm as well as physical problems. There is insufficient knowledge in the areas of medicine and science to permit the promiscuous unleashing of this drug without adequate medical or psychiatric supervision. The Church's proposed methods for the psychological and medical screening and supervision of members before, during and after ingestion of peyote are insufficient to provide for the safety of users. To administer this drug and other hallucinogens requires careful procedures. A physician is essential to the experience. Likewise, screening of the prospective user must be done by one capable of diagnosing certain psychological and medical factors which preclude the use of nonmedical personnel proposed by the Church.

The Church of the Awakening is generically different from the Native American Church of North America which is sui generis. The Native American Church is composed

See footnotes at end of document.

basically of Indians, who are treated differently from the ordinary citizenry of the United States. The relationship with the Federal Government has been established through law and treaty. The use of peyote in the Native American Church is different from and in no way similar to use of peyote proposed by the petitioners. Peyote in the Native American Church is a deity—a sacrament essential to the religion. Without peyote, the religion could not exist and would in fact, cease to function. This is not so with the Church of the Awakening. In the Church of the Awakening, it is an added attraction or an expeditious means to an end.

Both the First and Fourth Amendment application of the Constitution to the Native American Church of North America is different from the application of those clauses to the members of the Church of the Awakening.

There is a decided facility for drug abusers to enter into the membership of the Church of the Awakening. This would provide a ready means to acquire immunity from the law if the petition were granted. "Bad faith" of future members and monitors is a real problem under the proposed requirements enumerated by the Church. Granting of the exemption would create serious breaches in drug abuse legislation and open the door to pseudoreligions conceived for the purpose of circumventing drug laws intended to control the misuse of drugs.

Accordingly, it is recommended that this report be adopted and the petition of the Church of the Awakening be denied.

FREDERICK M. GARFIELD,
Hearing Officer.

See footnotes at end of document.

Footnotes

These footnotes are intended to be a guide only in demonstrating some of the evidence that established the facts in point. It is not intended to show the degree of importance or the totality of the evidence relied upon.

1. Responsibility for the enforcement of the Drug Abuse Control Amendments of 1965 was transferred from the Food and Drug Administration to the Bureau of Narcotics and Dangerous Drugs on April 8, 1968, by Presidential Reorganization Plan No. 1 of 1968.

2. GD Exhibit No. 1.

3. Seevers Deposition p. 15; GD Exhibit No. 1, p. 1; Merck Index p. 663.

4. Merck Index p. 787; GD Exhibit No. 1.

5. Seevers Deposition pp. 15-18; GD Exhibit No. 1, p. 1; Merck Index p. 625.

6. Seevers Deposition p. 15; Hollister Deposition p. 7.

7. GD Exhibit No. 1, pp. 9-12; Seevers Deposition pp. 15-18.

8. TR. p. 233.

9. GD Exhibit No. 1, p. 32.

10. Seevers Deposition pp. 15-18; GD Exhibit No. 1.

11. Seevers Deposition pp. 12-13.

12. TR. p. 57.

13. Seevers Deposition p. 10.

14. Seevers Deposition pp. 38-40; Hollister Deposition pp. 34-36, pp. 40-42.

15. Hollister Deposition pp. 13-16; TR. pp. 228-232.

16. Seevers Deposition p. 38.

17. TR. p. 464, pp. 758-769, pp. 771-773.

18. TR. p. 471.

19. TR. p. 670.

20. Government Exhibit No. 7; Government Exhibit No. 8; Government Exhibit No. 9; Government Exhibit No. 10; GD No. 2; GD No. 3; GD No. 6; TR. p. 764, pp. 589-594.

21. Ibid.: Hollister Deposition pp. 7-14; Winkler Deposition pp. 4-19, p. 31; TR. p. 824.

22. TR. p. 464, pp. 467-468, pp. 588-594, pp. 758-769, pp. 917-920.

23. Government Exhibit No. 11; Government Exhibit No. 12; Government Exhibit No. 13.

COPY BOUND CLOSE IN CENTER

24. TR. p. 613.

25. TR. pp. 758-769.

26. TR. pp. 611-614, pp. 761-769.

27. Seevers Deposition pp. 69-70; TR. pp. 611-614.

28. Seevers Deposition pp. 46-49; TR. pp. 616-618.

29. TR. p. 551.

30. TR. p. 652 .

31. TR. pp. 551-552, p. 558, pp. 606-608, pp. 650-651.

32. TR. pp. 606-608, pp. 650-651, pp. 615-619; TR. pp. 874-876.

33. TR. p. 551, p. 553, pp. 650-653.

34. TR. pp. 615-619.

35. Winkler Deposition pp. 4-7; Hollister Deposition pp. 7-9, p. 13.

36. TR. pp. 874-876.

37. TR. pp. 594-597, pp. 612-614; Winkler Deposition pp. 8-19; Hollister Deposition pp. 7-9, pp. 13-14.

38. TR. pp. 615-619.

39. TR, p. 471, pp. 613-619, p. 640.

40. TR. pp. 351-431, pp. 463-464, p. 612, pp. 619-632, pp. 822-830; Petitioners Exhibit No. 7; Petitioners Exhibit No. 8; Petitioners Exhibit No. 9; Petitioners Exhibit No. 10; Government Exhibit No. 5; H. Smith Deposition pp. 13-18, pp. 23-25, pp. 32-38.

41. Petitioners Exhibit No. 11; Petitioners Exhibit No. 12; TR. pp. 370-395.

42. TR. pp. 370-384.

43. Hollister Deposition p. 11; Aiken Affidavit in Petition, p. 7, pp. 12-13; TR. p. 388, pp. 596-598, pp. 600-605, p. 910.

44. Seevers Deposition pp. 46-49; Winkler Deposition pp. 8-12, p. 33; TR. pp. 295-302, pp. 446-447, pp. 461-463, pp. 876-884.

45. Winkler Deposition pp. 8-12, pp. 33-34; Hollister Deposition pp. 36-40; TR. pp. 214-218, pp. 295-301, p. 448, p. 604, pp. 876-887.

46. Seevers Deposition pp. 46-49; Winkler Deposition pp. 8-12; TR. pp. 446-463, pp. 608-612.

47. TR. 210-214, p. 478.

48. Aiken Affidavit in Petition pp. 11-18; TR. p. 133, p. 179, pp. 188-191.

49. H. Smith Deposition pp. 27-29, pp. 38-42.

50. TR. pp. 182-183.

51. TR. pp. 183-186, pp. 220-222.

52. TR. pp. 183-186, pp. 220-222, pp. 545-554, p. 911; Government Exhibit No 2.

53. TR. p. 180, p. 913.

54. TR. pp. 197-198, pp. 544-548.

55. TR. p. 180, pp. 188-189, pp. 203-210, pp. 221-222.

56. H. Smith Deposition pp. 43-44; TR. pp. 203-210, pp. 221-222, pp. 544-548.

57. TR. p. 140, p. 290; H. Smith Deposition pp. 57-68.

58. TR. p. 141, p. 247; H. Smith Deposition pp. 41-42, p. 51, p. 60.

59. TR. pp. 249-250, pp. 920-921.

60. TR. pp. 144-145, pp. 247-248, p. 903.

61. TR. p. 134, p. 177, p. 183.

62. H. Smith Deposition pp. 61-68.

63. TR. p. 173, pp. 213-214, p. 325.

64. TR. pp. 214-218, pp. 295-301, pp. 877-884.

65. TR. p. 325, pp. 877-884.

66. TR. pp. 214-218, pp. 295-301, pp. 877-884.

67. TR. pp. 156-171, pp. 174-175, pp. 877-884; Petitioners Exhibit No. 4; Petitioners Exhibit No. 5; Aiken Affidavit in Petition pp. 7-8, p. 12.

68. Aiken Affidavit in Petition p. 7.

69. TR. p. 915.

70. TR. pp. 194-202, pp. 646-647, p. 593, p. 325.

71. TR. p. 175; Petitioners Exhibit No. 5; Aiken Affidavit in Petition pp. 7-8, p. 12.

72. TR. pp. 102-103, pp. 139-140, pp. 212-213, p. 326, p. 454; H. Smith Deposition p. 49; Petitioners Exhibit No. 5.

73. TR. p. 145, p. 180, pp. 203-210, pp. 221-222, p. 238, p. 294, pp. 544-546, p. 621, pp. 913-915; H. Smith Deposition p. 50.

74. TR. pp. 104-111, pp. 240-242, pp. 266-277, pp. 487-488, p. 702, pp. 707-710; H. Smith Deposition pp. 41-49; Government Exhibit No. 13; Government Exhibit No. 12; Government Exhibit No. 11.

75. TR. pp. 580-581, pp. 575-697, pp. 806-818; U. S. Constitution Article I, Section 8, Chapter 3.

76. TR. pp. 782-783, pp. 787-789.

The report, findings of fact, conclusions, and recommendations of the hearing examiner were accepted in their entirety by the Director of the Bureau of Narcotics and Dangerous Drugs and published in the FEDERAL REGISTER of February 12, 1970 (35 F. R. 2874) as part of the proposed findings of fact and conclusions and the tentative order of the Director denying the petition of the Church of the Awakening.

In response to the tentative order the Church of the Awakening requested an opportunity to reopen the hearing for the purpose of recross-examining one of the Government's witnesses and for submitting two additional exhibits. This request was granted and the hearing was held on July 1, 1970. It was the finding of the hearing examiner, after reviewing and evaluating the testimony elicited and the two exhibits submitted by the petitioner, that the additional evidence does not in any way change his previous findings of fact, conclusions and recommendations. After reviewing the new evidence it is the decision of the Director to accept the finding of the hearing examiner.

Therefore, it is ordered, that it is the decision of the Director of the Bureau of Narcotics and Dangerous Drugs that the petition of the Church of the Awakening is denied.

At the supplemental hearing on July 1, 1970, the hearing examiner stated that the petitioner would have 30 days to comment upon the above findings, conclusions and decision. (Tr. pages 857-859.) Therefore, this order will not take effect until after further publication in the FEDERAL REGISTER. Such publication shall not take place until 30 days from the date of publication of this notice.

Dated: September 10, 1970.

JOHN E. INGERSOLL,
Director, Bureau of Narcotics and Dangerous Drugs.

[F. R. Doc. 70-12663; Filed, Sept. 22, 1970; 8:51 a.m.]

APPENDIX.

Reported at 459 F. 2d 415-418.

UNITED STATES COURT OF APPEALS

For the Ninth Circuit

PATRICIA LOU KENNEDY, et al.,
Petitioners,
vs.
BUREAU OF NARCOTICS AND DANGEROUS DRUGS, et al.,
Respondents.

No. 71-1157.

[April 5, 1972.]

APPEAL FROM A DECISION OF THE UNITED STATES BUREAU OF NARCOTICS AND DANGEROUS DRUGS.

Before: MERRILL and HUFSTEDLER, *Circuit Judges,* and CROCKER,* *District Judge.*

HUFSTEDLER, *Circuit Judge:*

The Church of the Awakening, its president, and four church members seek review of an order of the Director of the Bureau of Narcotics and Dangerous Drugs rejecting their petition to amend 21 C. F. R. § 320.3(c)(3) to include the Church of the Awakening within the exemption accorded the Native American Church for the use of peyote in religious services.[1]

* Honorable M. D. Crocker, United States Judge for the Eastern District of California, sitting by designation.

1. The petition to amend the regulation was filed pursuant to 21 C. F. R. § 316.65.

The challenged regulation provides:

> "The listing of peyote in this subparagraph[2] does not apply to nondrug use in bona fide religious ceremonies of the Native American Church; however, persons supplying the product to the Church are required to register and maintain appropriate records of receipts and disbursements of the article."

Petitioners sought to amend the regulation by adding the words "and of the Church of the Awakening" after the words "Native American Church."

Peyote grows in small buttons on a species of cacti found in parts of Texas and northern Mexico. When the buttons are chewed or brewed into a tea and ingested, the user experiences hallucinations. That effect is produced from the mescaline content of the buttons.

The Native American Church is a religious organization of American Indians drawn from a variety of western tribes. Membership in the church is roughly estimated to be 300,000. Peyote use is central to the religion of the church.[3]

The substance of petitioners' primary contention is that section 320.3(c)(3) violates the due process clause of the Fifth Amendment because the regulation creates an arbitrary classification distinguishing between (a) members of the Native American Church who use peyote in bona fide religious ceremonies who are exempt and (b) members of the Church of the Awakening who use peyote in bona fide religious ceremonies who are not exempt.

---

2. Peyote is designated as an hallucinogenic drug regulated by 21 C. F. R. § 320.2, under authority of the Federal Food, Drug and Cosmetics Act, 21 U. S. C. §§ 301 *et seq.*

3. The role of peyote in the Native American Church and the history of peyotism are described by the California Supreme Court in *People* v. *Woody* (1964), 61 Cal. 2d 716, 40 Cal. Rptr. 69, 394 P. 2d 814. The court held that a California penal statute prohibiting the use of peyote could not be constitutionally applied to the ritual use of peyote by the Navajo Indian defendants who were adherents of the Native American Church. In the court's view, the application of the statute to those Indians who belonged to the Native American Church violated freedom of religion as secured by the First Amendment.

For the purpose of our review of the Director's order, the Government concedes that the Church of the Awakening is a valid religious organization and that the use of peyote by the church members is a part of bona fide religious ceremonies of the church. It argues, however, that the classification is not arbitrary, because the members of the Native American Church are Indians who are specially classified for many purposes, including this one, and that peyote is central to the religious rites of the North American Church and not as central to the ceremonies of the Church of the Awakening.

We agree that Indians are classified differently from non-Indians for some purposes. We assume, without deciding, that peyote use is more important to the religious beliefs of the Native American Church than it is to the Church of the Awakening. However, neither of those assumptions makes a constitutional difference unless the distinctions have some rational relationship to the legitimate governmental interest or interests to be served by the challenged regulation.

The sole governmental interest to be served by regulating the use of peyote is the protection of the health of the citizens by controlling the manufacture, sale, and use of dangerous or potentially dangerous drugs.

The Government asserts that peyote is a dangerous drug. We assume for the purpose of this decision that the Government is right. We are nevertheless unable to perceive that any of the distinctions that the Government draws between the members of the Native American Church and the rites of the church and the members of the Church of the Awakening and its rites have any bearing on the legitimate Government end to be served. We cannot say that the Government has a lesser or different interest in protecting the health of Indians than it has in protecting the health of non-Indians. We cannot say that the Government's interest in a church member's health increases or diminishes depending upon whether his ingestion of a dangerous drug is of greater or lesser importance in the religious ceremonies of his church. It follows that the exemption regulation creates an arbitrary classification that cannot withstand

substantive due process attack. (*Meyer* v. *Nebraska* (1923), 262 U. S. 390, 400. *See also Boddie* v. *Connecticut* (1971), 401 U. S. 371, 379; *Hurtado* v. *California* (1884), 110 U. S. 516, 532.)

Petitioners' effort to expand the regulation to include the Church of the Awakening avoids the classification it has attacked, but it suffers the same constitutional infirmity as the present regulation. As petitioners would amend the regulation, it would create one classification for its church and the Native American Church, both of which would be exempt, and a second classification for all other churches that use peyote in bona fide religious ceremonies, which would be nonexempt. The new classification fares no better constitutionally than the old one.

The question whether or not the religious use of peyote by the members of any church is protected by the First Amendment is not properly before us. The only issue is the constitutionality of the exemption regulation.

We decline to reach the remaining constitutional contentions because the resolution of the due process issue disposes of the case.

The order is AFFIRMED.

CROCKER, *District Judge:*

CONCURRING OPINION.

I concur with the majority that the petition of the Church of the Awakening for exemption for use of Peyote in religious services was properly rejected by the Director of the Bureau of Narcotics and Dangerous Drugs.

21 C. F. R. § 320.3(c)(3) was enacted under the "Police Power" to protect the health, safety and welfare of the citizenry. The Director found, and the majority assumes, that peyote is a dangerous hallucinogenic substance.

It has been strongly propounded that this "police power", will prevail over an individual's right to freely practice his religious beliefs where the practice involves criminal conduct. [see, *Leary* v. *U. S.*, 383 F. 2d 851 (5th Cir. 1967), reversed on other grounds, 395 U. S. 6; *U. S.* v. *Kuch*, 288

Fed. Supp. 439 (D. C. Dist. Col. 1966); Annot. 35 A. L. R. 3d 939].

The court in the *Leary* case set out the applicable test in stating at p. 859:

> "Religious freedom, guaranteed by the Constitution, must be weighed with the public interest and the broad power to legislate vested in Congress by the Constitution. Thus the First Amendment 'embraces two concepts—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be.' The freedom to act is conditional and relative and Congress may prescribe and enforce certain conditions to control conduct which may be contrary to a person's religious beliefs in the interest of the public welfare and protection of society."

The Director concluded from the evidence that the governmental interest sufficiently outweighed the First Amendment rights of the petitioners. The record substantiates this finding.

In support of their contentions, petitioners cite *People* v. *Woody*, 61 Cal. 2d 716 (1964), which involves a unique and extremely restricted exemption to the use of peyote in religious services. This is essentially attributable to the historical roots from which the Native American Church stems. See, *U. S.* v. *Kagama*, 118 U. S. 375 (1886); 25 U. S. C. §§ 1302-03. The Church of the Awakening lacks this historical culture which would bring it within the exemption. Also, in the *Woody* case it was established that:

> "Although peyote serves as a sacramental symbol similar to bread and wine in certain Christian churches, it is more than a sacrament. Peyote constitutes in itself an object of worship; prayers are directed to it much as prayers are devoted to the Holy Ghost. On the other hand to use peyote for nonreligious purposes is sacrilegious." (page 721)

The founder of the Church of the Awakening, Dr. Aiken, testified that the "mystical experience" sought by practitioners of the church can be achieved more quickly with peyote than with the numerous other methods employed

PY BOUND CLOSE IN CENTER

Peyote therefore appears to be a means to an end in the realm of the Church of the Awakening, whereas the Indians worship the drug itself.

Membership in the Native American Church is limited to those of at least one-quarter Indian blood, as compared to the Church of the Awakening which requires only that a prospective member convince the governing body of the church that he agrees with the principles of the church.

Thus the exemption granted the Native American Church is reasonable, and denying the exemption to petitioners does not violate their constitutional rights.

The Government's interest in controlling the use of peyote out weighs the infringement upon petitioners' practice of their religion and the order of the Director is affirmed.

APPENDIX.

Determinations under prior law effective under current law. Subsection (c), Section 702 (21 U. S. C. 321—note—savings provision). Comprehensive Drug Abuse Prevention and Control Act of 1970—Public Law 91-513:

> (c) All administrative proceedings before the Bureau of Narcotics and Dangerous Drugs on the date of enactment of this Act shall be continued and brought to final determination in accord with laws and regulations in effect prior to such date of enactment. Where a drug is finally determined under such proceedings to be a depressant or stimulant drug, as defined in section 201(v) of the Federal Food, Drug, and Cosmetic Act, such drug shall automatically be controlled under this title by the Attorney General without further proceedings and listed in the appropriate schedule after he has obtained the recommendation of the Secretary. Any drug with respect to which such a final determination has been made prior to the date of enactment of this Act which is not listed in section 202 within schedules I through V shall automatically be controlled under this title by the Attorney General without further proceedings, and be listed in the appropriate schedule, after he has obtained the recommendations of the Secretary.

Regulation exempting peyote under present law—21 C. F. R. 307.31:

§ 307.31 Native American Church.

> The listing of peyote as a controlled substance in schedule I does not apply to the nondrug use of peyote in bona fide religious ceremonies of the Native American Church, and members of the Native American Church so using peyote are exempt from registration. Any person who manufactures peyote for or distributes peyote to the Native American Church, however, is required to obtain registration annually and to comply with all other requirements of law.

COPY BOUND CLOSE IN CENTER

APPENDIX

Order entered June 21, 1972 by Ninth Circuit denying petition for Rehearing.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Filed June 21, 1972 - Clerk

PATRICIA LOU KENNEDY, et al., Petitioners, v. BUREAU OF NARCOTICS AND DANGEROUS DRUGS, et al., Respondents	No. 71 - 1157 ORDER

Before: MERRILL and HUFSTEDLER, Circuit Judges, and CROCKER,* District Judge

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing in banc.

The full court has been advised of the suggestion for an in banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing in banc. Fed. R. App. Proc. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing in banc is rejected.

---

* Hon. M. D. Crocker, United States Judge for the Eastern District of California, sitting by designation.

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-451

PATRICIA LOU KENNEDY, ET AL., PETITIONERS

v.

BUREAU OF NARCOTICS AND DANGEROUS DRUGS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Congress has designated peyote as a "controlled substance" subject to restrictions on manufacture, distribution, and possession under the Comprehensive Drug Abuse Prevention and Control Act of 1970, P.L. 91-513, 84 Stat. 1236. (21 U.S.C. 812(c), Schedule I(c)(12)). Similar restrictions had previously been applied to peyote by regulation of the Bureau of Narcotics and Dangerous Drugs, pursuant to the Drug Abuse Control Amendments of 1965. The Bureau has, by regulation, made the restrictions on peyote inapplicable "to the non-drug use of peyote in bona fide religious ceremonies of the Native American Church" (21 C.F.R. 307.31; Pet. App. A40), a religious organization of American Indians. This proceeding arises from a petition by the

Church of the Awakening and certain of its individual members, non-Indians, to extend the exemption to include the Church of the Awakening.

Following an extensive hearing and the issuance of a hearing officer's report containing detailed findings of fact and conclusions (Pet. App. A11–A32), the Director of the Bureau of Narcotics and Dangerous Drugs denied the petition of the Church of the Awakening. This decision was based on detailed findings regarding the potential physiological and psychological dangers inherent in the use of peyote and the absence of any current approved medical use of the drug (Pet. App. A19–A22), as well as findings regarding the organization of the Church of the Awakening and the manner in which it proposed to make the drug available for use by its members (Pet. App. A23–A26). The Director concluded that the governmental interest in fostering the public health and welfare by curbing the use of a drug "with a potential for abuse because of its hallucinogenic effect" (Pet. App. A28) outweighed the interest of the Church in being able to use the drug in connection with the practice of its religion. The denial of the petition was found to be justified, notwithstanding the existence of an exemption for the Native American Church, on the ground that membership in the latter church is limited to Indians, who for historical reasons may constitutionally be afforded different treatment in matters of religious practice than other persons, and on the further ground that the use of peyote is essential to the very existence of the Native American Church, but not to the present applicants, so that

the impact of a governmental prohibition in the present instance would not be so severe as to outweigh the public health and welfare considerations underlying the prohibition (Pet. App. A28–A29).

On appeal, the court of appeals affirmed the Director's refusal to exempt the Church of the Awakening (Pet. App. A35–A39). Petitioners attack the decision below on two grounds: First, they assert that they have a constitutionally protected right under the Free Exercise Clause to religious use of the drug; second, they contend that the government cannot constitutionally exempt the Native American Church while withholding a similar exemption from the Church of the Awakening.

1. This case does not involve a challenge to the government's general right to regulate and restrict the use of peyote. Petitioners concede that "[p]eyote is potentially dangerous to society" and that the government has an interest in stemming "illicit and dangerous usage" of the drug (Pet. 14).

2. The First Amendment does not prohibit Congress from regulating the manufacture, distribution, and possession of peyote and other hallucinogenic drugs and from applying such regulation to persons who seek to use the drugs for allegedly religious purposes in the same manner as it is applied to those whose use is motivated by other considerations. See *Leary* v. *United States,* 383 F. 2d 851, 859–862 (C.A. 5), certiorari denied as to this issue, 392 U.S. 903, reversed on other grounds, 395 U.S. 6; *United States* v. *Hudson,* 431 F. 2d 468, 469 (C.A. 5), certiorari denied, 400 U.S. 1011; *United States* v. *Kuch,* 288 F. Supp. 439,

445 (D.D.C.). As stated by this Court, religious freedom "embraces two concepts—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society." *Cantwell* v. *Connecticut*, 310 U.S. 296, 303–304. See also *Braunfeld* v. *Brown*, 366 U.S. 599; *Reynolds* v. *United States*, 98 U.S. 145. In the instant case, refusal of the exemption in no way inhibits petitioners' religious beliefs; rather, it prohibits conduct found by Congress to be inimical to the overriding public interest.[1]

3. Petitioners contend that, in enacting the Drug Abuse Control Amendments of 1965, "Congress recognized religious use of peyote as a practice protected by the free exercise clause" (Pet. 13). This assertion is predicated upon certain ambiguous legislative history. The House version of the bill originally contained a specific exemption of peyote "insofar as its use is in connection with the ceremonies of a bona fide religious organization" (Pet. App. A1). The Senate deleted this provision. Concurrence by the House in the Senate's action appears to have been predi-

[1] *Sherbert* v. *Verner*, 374 U.S. 398, does not aid petitioners. There the Court found no "compelling state interest" in disqualifying that petitioner from unemployment benefits because her religious beliefs prohibited work on Saturdays. Here, however, Congress has shown grave concern with respect to the use of various potentially dangerous drugs, including peyote. This compelling governmental concern is adequate to negate petitioners' assertion of a right to use peyote as an aid to the practice of their religion—especially in light of the unchallenged finding that such use is not essential to the practice of the religion (Specialized Finding of Fact 22, Pet. App. A26).

cated, at least in part, on the view expressed by the Commissioner of Food and Drugs (who was given the initial responsibility of enforcing the legislation) that the bill, "even without the peyote exemption * * * cannot forbid bona fide religious use of peyote" (Pet. App. A3). As shown above, this view is, as a constitutional proposition, incorrect, and its expression by the Commissioner cannot be considered binding upon the government. Nor does the foregoing history justify interpretation of the statute as requiring exemption of all religious uses of peyote. The language that would have required this result was specifically stricken from the bill by the Senate, with the concurrence of the House, and there is no evidence that the Senate intended such a sweeping exception to be carved out. It would be improper to read the deleted language into the statute in the absence of evidence that both Houses of Congress entertained such an intention; if anything, the history of this legislation suggests the opposite conclusion.[1]

4. The remaining issue concerns the lawfulness of refusing an exemption to the Church of the Awakening while continuing to exempt the Native Ameri-

[1] It is clear, moreover, that the concern that motivated the proposed language in the House bill and that underlay the Commissioner's letter was prompted by what was seen at the time as a unique practice of the North American Church (predecessor to the Native American Church). Whatever may be inferred regarding congressional solicitude for the religious practices of Indians, there is little warrant for extending the inference to encompass then-unknown non-Indian groups such as that of petitioners (Pet. App. A2-A5).

can Church. Petitioners contend that such action constitutes an establishment of the Native American Church and is invalid for that reason (Pet. 15). The concurring opinion in the court of appeals stated what we believe to be the correct view—that the special treatment of the Native American Church has a rational basis and an historical justification and provides no grounds for complaint by others (Pet. App. A37–A39).[5]

a) We have no quarrel with the general proposition that governmental action should not discriminate in favor of or against one or all religions. We are dealing here, however, with a special and unusual situation. The religious use of peyote by Indians has a history going back at least 400 years. See *People* v. *Woody*, 61 Cal. 2d 716, 720, 394 P. 2d 813, 817. The Native American Church is an American Indian tribal religion, with membership limited to Indians. Peyote has, moreover, a unique role in the religion of the Native American Church: "It is essential to their religion; it is a deity; it is a subject of worship as well as an instrument of worship and without it, the religion would cease to exist and could not function" (Specialized Finding of Fact 23, Pet. App. A26). These factors justify a special exemption for

[5] The majority in the court of appeals, on the other hand, found that the distinction was constitutionally impermissible on substantive due process grounds; but it affirmed the denial of the exemption because it held that classifying the Church of the Awakening with the Native American Church as both entitled to exemptions would continue, by its exclusion of others who might have a religious basis for peyote use, to be constitutionally infirm (Pet. App. A37).

peyote use in the religious ceremonies of the Native American Church that is not made available to others.

b) The legal treatment of Indians has long been recognized as being different in significant respects from that of other persons. See *United States* v. *Kagama*, 118 U.S. 375, 381–382; *Maryland Cas. Co.* v. *Citizens Nat'l Bank*, 361 F. 2d 517, 520 (C.A. 5); *Native American Church* v. *Navajo Tribal Council*, 272 F. 2d 131, 133–134 (C.A. 10); 25 U.S.C. 1–1341; 18 U.S.C. 1151–1165. Thus, for example, Indians may have immunity from fishing license fees not afforded other citizens. (*Tulee* v. *Washington*, 315 U.S. 681); immunity from state taxation with regard to income earned on a reservation (see Brief for the United States as Amicus Curiae in *McClanahan* v. *Arizona State Tax Commission*, No. 71–834; compare Memorandum for the United States as Amicus Curiae in *Kahn* v. *Arizona State Tax Commission*, No. 71–1263); or even subjection to lower penalties than a non-Indian for the same criminal offense (18 U.S.C. 1153; *Gray* v. *United States*, 394 F. 2d 96, certiorari denied, 393 U.S. 985). Such distinctions hold true in the area of religion as well, where Congress has shown a particular regard for tribal autonomy. While the Indian Bill of Rights prohibits tribes from interfering with the free exercise of religion. (25 U.S.C. 1302(1)), it contains no clause prohibiting establishment of religion—an omission reflecting congressional fear that an "establishment clause" would lead to disintegration of the theocratic tribes. See Note, *The Indian Bill of Rights and the Constitutional Status of Tribal Governments*, 82 Harv. L. Rev. 1343, 1364–1365.

c) The long history of religious use of peyote by Indians reinforces the validity of providing a special exemption for the Native American Church, much as the history of the Amish religion warranted an exemption from state compulsory education laws in *Wisconsin* v. *Yoder,* 406 U.S. 205, 215–219; cf. *Walz* v. *Tax Commission,* 397 U.S. 664, 676–680. No similar historical considerations reinforce petitioners' claim for an exemption.

d) Finally, the centrality of peyote use to the very existence of the Native American Church—an importance it does not have for the Church of the Awakening, for whose members it is merely one of several means for facilitating the religious experience—lends further support to the reasonableness of the distinction drawn by the Director. The principles enunciated in *Sherbert* v. *Verner, supra,* compel a balancing between the governmental interest in regulation and the individual interest in conduct asserted to involve a religious exercise. Where the latter interest is of such overwhelming importance that the continuation of a religion that has existed in one form or another for hundreds of years is at stake, it is a factor that may constitutionally be considered. The absence of such an interest in this case justified rejection of petitioners' application.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

DECEMBER 1972.

U.S. GOVERNMENT PRINTING OFFICE: 1972

FILE COPY

Supreme Court, U. S.
FILED
FEB 2 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

No. 72-451

PATRICIA LOU KENNEDY, DR. VERNON G. BOIDO, FRANCES V. DUREN, CHARLES T. TART, PH.D., THE CHURCH OF THE AWAKENING, A NEW MEXICO RELIGIOUS CORPORATION, AND JOHN W. AIKEN,
Petitioners,

vs.

BUREAU OF NARCOTICS AND DANGEROUS DRUGS, UNITED STATES DEPARTMENT OF JUSTICE; JOHN E. INGERSOLL, DIRECTOR,
Respondents.

PETITION FOR REHEARING ON PETITION FOR A WRIT OF CERTIORARI.

ROBERT J. BURDETT,
ROBERT J. BURDETT, JR.,
Bankers Building—Suite No. 2220,
105 West Adams,
Chicago, Illinois 60603,
Phone: (312) 641-0488,

DALE B. DILTS,
6022 Constitution, N. E.,
Albuquerque, New Mexico,
Phone: (505) 265-7538,

BRUCE M. GLEASON,
8155 Van Nuys Boulevard,
Panorama City, California 91402,
(213) 873-5980,
Attorneys for Petitioners.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

No. 72-451.

PATRICIA LOU KENNEDY, DR. VERNON G. BOIDO, FRANCES V. DUREN, CHARLES T. TART, PH.D., THE CHURCH OF THE AWAKENING, A NEW MEXICO RELIGIOUS CORPORATION, AND JOHN W. AIKEN,

Petitioners,

vs.

BUREAU OF NARCOTICS AND DANGEROUS DRUGS, UNITED STATES DEPARTMENT OF JUSTICE; JOHN E. INGERSOLL, DIRECTOR,

Respondents.

PETITION FOR REHEARING ON PETITION FOR A WRIT OF CERTIORARI.

The Petitioners, Patricia Lou Kennedy, Dr. Vernon G. Boido, Frances V. Duren, Charles T. Tart, Ph.D., The Church of the Awakening, a New Mexico Religious Corporation, and John W. Aiken, respectfully pray that this Court grant a rehearing on their Petition for a Writ of Certiorari filed herein; and that upon such rehearing that a Writ of Certiorari issue to review judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on April 5, 1972.

INTERVENING CIRCUMSTANCES OF SUBSTANTIAL AND CONTROLLING EFFECT.

Justice Department's determination to disregard Appeals Court decision below. One intervening circumstance relied upon as ground for this rehearing is that, following denial of Certiorari herein on January 8, 1973[1] the Department of Justice, Bureau of Narcotics and Dangerous Drugs, has made a considered decision to continue in force the regulation exempting religious use of Peyote by the Native American Church.[2]

The Court of Appeals has held that the regulation is void as creating an arbitrary classification in excluding "all other churches that use Peyote in bona fide religious ceremonies" from the exemption granted the Indian Church.[3]

To reach such conclusion the Court held: "We are . . . unable to perceive that any of the distinctions that the Government draws between the members of the Native American Church and the rites of the Church and members of the Church of the Awakening and its rites have any bearing on the legitimate Government end to be served. We cannot say that the Government has a lesser or different interest in protecting the health of Indians than it

1. A like determination by the Bureau was made following the Court of Appeals decision April 5, 1972. If known to it, this would have prompted rehearing by that Court. The earlier determination raises an interesting question of candor owed this Court on certiorari.

2. (21 C. F. R. 307.31; Pet. App. A. 40). This regulation is promulgated under the current law (21 U. S. C. 812(c), Sched. (I) (c) (12), and would be controlled by decision favoring petitioners under the savings provision of the 1970 statute (21 U. S. C.) 321 .... note .... savings provision; Pet. App. A. 40)

3. Pet. App. A. 37. The Court holds that the amendment of the regulation sought by Petitioners to include the Church of the Awakening within the exemption, created a class no less arbitrary; and denied petitioner relief for that reason.

has in protecting the health of non-Indians. We cannot say that the Government's interest in a church member's health increases or diminishes depending on whether his ingestion of a dangerous drug is of greater or less importance in the religious ceremonies of his church.'"[4]

The arbitrary classification found by the Court would be alleviated if the exemption included "all other churches that use Peyote in bona fide religious ceremonies." Such broadening of the exemption would include use by the Petitioning Church. The Government refuses to recognize the finding of arbitrary classification; but wholeheartedly approves denial of relief to Petitioners.

Petitioners' action in the case was predicated on the regulation, amendment of which was sought under the appropriate administrative procedure,[5] and when the Appeals Court voided the regulation, it undercut the vehicle by which Petitioners come into Court. Thus Petitioners are left in limbo; and adjudicated so by a decision the Department of Justice ignores.

Under these circumstances, we submit that in equity and good conscience the stance now taken by the Government should be considered equivalent to a confession of error before this Court, and that certiorari should be granted here.

The legalistic shell game resultant from the proceedings below affords ample basis for such course.[6]

But the Petitioners' rights are not the sole consideration for such review. Other cases involving similar issues in-

4. Pet. App. A. 36. This reasoning is applied to due process under the Fifth Amendment, which was not raised. It is equally cogent to the Establishment clause of the First Amendment, which was raised.

5. 21 U. S. C. 371(e).

6. Gravely mistaken and misleading statements of issues, calling for Rule 19.1(b) Supervision, are shown *post*.

evitably will reach this Court. Thus the press of this Court's business should not deter review. Rather, review now will conserve effort in the long run.

There is no inclination on the Department of Justice to broaden the regulation as the Appeals decision requires under the Fifth Amendment or, as we have argued, for even-handed treatment under the Establishment Clause of the First.

If these Petitioners are correct in their contentions, a finding so by this Court should issue quickly. Delay only subjects citizens to the degrading treatment accorded the defendants in *Whittingham*, discussed below, most of whom pleaded guilty despite their Constitutional right to conduct themselves as they did.

We suggest the ultimate solution as to use of psychedelic drugs,—of which this case is but a tiny part,—lies in the area of religion. To grant certiorari here will provide a start in that direction.

Second intervening circumstance,—Arizona case decided January 9, 1973. The Arizona Court of Appeals, Department A, Division One at Phoenix, decided *Arizona* v. *Whittingham, et al.*, on said date reversing the conviction of Greg and Janice Whittingham, both 26, of Grenada Hills, California for possession of Peyote, a misdemeanor under Arizona law. The opinion is as yet unpublished.

Over forty people, some Indians and others non-Indians, gathered together at Parks, Arizona "to bless the marriages of the defendants Janice Whittingham and Greg Whittingham and another couple". The ceremony was presided over by Indians from the Navajo reservation and constituted a meeting of the Native American Church. While Janice Whittingham testified she was one fourth Blackfoot Indian, her husband and most of the others present were non-Indian. All present were charged with

possession of Peyote. The Indians were dismissed, the Whittinghams were convicted, and all of the others pleaded guilty and received probation.

The Court upheld the right of the Whittinghams to partake of Peyote as sacrament in the Native American Church ceremonies under the First Amendment.

Both the Department of Justice in its briefs in this case, and the concurring opinion of Judge Crocker sitting with the Ninth Circuit, make much of the distinction between Indians and non-Indians insofar as the use of Peyote in religious ceremonies is concerned.

The Arizona case refutes the Government assertion that the regulation confines religious use of peyote to Indians alone.[7] Non-Indian participation in Native American Church ceremonies makes the regulation now reaffirmed by the Government clearly discriminatory. To decline review in the light of the Arizona case permits continued Government action to thwart religious freedom.

The reasoning of the Arizona decision likewise obliterates all of the corollaries of that distinction argued by the Department of Justice, i.e.: cultural differences between Indians and non-Indians; the different legal status of Indians on reservation and white citizens; and the historic usage of Peyote by the native American Indian. The brief of the Government before this Court indicates that these questions will be relied on in the future in like cases.

We submit that this Court should review this matter at this time and settle finally all such questions.

---

7. "However, membership to persons who are not members of Indiana Tribes or do not have Indian heritage, is usually not refused." *Arizona* v. *Whittingham*, Jan. 9, 1973, *supra*.

OTHER SUBSTANTIAL GROUNDS AVAILABLE TO PETITIONER NOT PREVIOUSLY PRESENTED.

The majority opinion seriously misstates the issues before the Court. A different case than the one presented to the Court is shown by the majority opinion of the Court of Appeals.

Immediately below is reproduced the mistaken Statement of issues:

> The substance of petitioners' primary contention is that section 320.3(c)(3) violates the due process clause of the Fifth Amendment because the regulation creates an arbitrary classification distinguishing between (a) members of the Native American Church who use peyote in bona fide religious ceremonies who are exempt and (b) members of the Church of the Awakening who use peyote in bona fide religious ceremonies who are not exempt. (Pet. App. A. 35)

No such contention was made, primary or otherwise.

In an Appendix, *post*, we show the Summary of Arguments of the Briefs before the Appeals Court. The contentions made by Petitioners were based solely on the religious freedom clauses of the First Amendment, that in favoring the Indian Church and denying theirs, such action was a violation of the Establishment clause; that Government attempt to justify the distinction on a doctrinal basis was interference with Free Exercise; and that to deny the exemption to petitioning church on grounds of health, while allowing like use to another, violates Free Exercise.

Had the issues before the Court been stated correctly, the opinion could not have said as it did:

> The question whether or not the religious use of peyote by the members of any church is protected by the First Amendment is not properly before us. The only issue is the constitutionality of the exemption regulation. (Pet. App. A. 37)

Moreover, it was not the *regulation* that was contended to be unconstitutional, but the *interpretation* given it in the administrative proceedings below.

We submit that such an erroneous description by an appeals court in a case involving First Amendment questions of religious freedom constitutes such departure "from the accepted and usual course of judicial proceedings * * * as to call for the exercise of this court's power of supervision".[8]

Only the members of this Court can say what effect these misstatements of the issues before it by the Court of Appeals may have had on their vote as to Certiorari here. Verity would be more apt to be attributed to the opinion than to counsel, so the impact could be fatal.

We petitioned for rehearing before the Appeals Court in banc. We must guess as to the result of the misleading statements on those Judges not participating in the decision there.

Thus, the members of this Court, and the other judges of the Ninth Circuit, were given to believe that only a Fifth Amendment contention was raised. It is certainly possible, if not probable, that less consideration was accorded such issue than would have been the case if the First Amendment questions actually presented were correctly shown in the Court of Appeals opinion.

Taken by themselves, the mistaken statements compel certiorari under Rule 19.1(b) of this Court.

When we consider that the misstatements bind alone of all the world the Petitioners whose actual contentions are distorted by the Court, the situation becomes a travesty! Such is the effect produced by the determination by our adversary to disregard the decision.

This is the legalistic sleight of hand referred to in the

8. Rule 19.1(b).

forepart of this Petition. Certainly it justifies the appellation.

Unpopular causes are especially to be protected. We ask if this Court has overlooked that it is the claims of unpopular classes, sects and groups, the odd-balls, which must be protected if fundamental rights are not to be eroded.

We suggest that appropriate test in said cases for granting Certiorari would be the degrees of dislike, disagreement or aversion which the particular Justice has respecting the religious practice for which petitioners seek protection. To apply the test, a vote would tend to be affirmative in direct proportion to the degree of dislike, disagreement, or aversion.

CONCLUSION.

For the reasons set forth a rehearing is prayed on the Petition for a Writ of Certiorari herein; and that upon such rehearing a Writ of Certiorari issue as heretofore prayed.

Respectfully submitted,

ROBERT J. BURDETT,
ROBERT J. BURDETT, JR.,
Bankers Building—Suite No. 2220,
105 West Adams,
Chicago, Illinois 60603,
Phone: (312) 641-0488,

DALE B. DILTS,
6022 Constitution, N. E.,
Albuquerque, New Mexico,
Phone: (505) 265-7538,

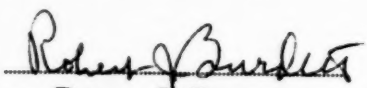
BRUCE M. GLEASON,
8155 Van Nuys Boulevard,
Panorama City, California 91402,
(213) 873-5980,
Attorneys for Petitioners.

January 29, 1973.

CERTIFICATE

I, ROBERT J. BURDETT, do hereby certify that I am counsel for Petitioners herein and that said Petition is presented in good faith and not for delay.

I do further certify that said Petition is restricted to intervening circumstances of substantial and controlling effect, consisting of the determination of the Department of Justice to continue in effect the regulation held invalid by the Court of Appeals below, and of the Arizona Appeals Court decision referred to, handed down January 9, 1973; and limited also to other substantial grounds available to Petitioners but not previously presented, namely, that the mistaken and misleading statement of the issues by the Court below calls for the supervisory power of this Court; and the point that unpopular causes are especially to be protected.



ROBERT J. BURDETT

Chicago, Illinois
January 29, 1973.

APPENDIX.

SUMMARIES OF ARGUMENT FROM APPEALS COURT BRIEFS.

(Brief in Chief)

TABLE OF CONTENTS.

PAGE

A. Summary of Argument 14

B. Argument of Issues 17

I. In the argument that petitioning Church is not a religion and that peyote is not essential to its practices, the Government enters forbidden domain 17

II. In according favored treatment to one Church and denying it to another the Government violates the establishment clause of the First Amendment 20

III. In denying use of peyote based on a doctrinal argument, the Government violates the free exercise clause of the First Amendment .. 24

IV. Fear of abuse by others does not warrant infringement of religious liberties under the First Amendment 28

V. Where First Amendment protection is given one Church, the Director may not assert against a second Church any claims that likewise are applicable to the protected Church. Irrespective, there is no substance to the claim of danger 31

4. Conclusion 41

APPENDIX.

(Government Brief)

TABLE OF CONTENTS.

PAGE

Authorities Cited II

* * * * *

Argument 6

I. The First Amendment does not afford the Church of the Awakening an absolute right to claim a religious exemption for the use of peyote by its members 6

II. The Government has a compelling interest in controlling peyote, which interest outweighs any interference with the Church of the Awakening's religious practices 11

III. The unique status of the Native American Church justifies the regulation allowing its use of peyote in bona fide religious ceremonies 17

A. The legal treatment of Indians is different from the legal treatment of other citizens 18

B. The Church of the Awakening and the Native American Church are culturally separate and apart from each other 20

IV. The Decision of the Director of the Bureau of Narcotics and Dangerous Drugs is based upon substantial evidence, and the hearing conducted below was fair and impartial .. 23

A. The standard of review which must be applied in this case is the substantial evidence test 23

B. There is substantial evidence for the findings of the Director of the Bureau of Narcotics and Dangerous Drugs that peyote is dangerous, actually or potentially .. 25

1. There is substantial evidence that mescaline—the hallucinogenic alkaloid present in peyote—and lysergic acid diethylamide are comparable as teratogenic agents 27

2. The record demonstrates that peyote has a potential danger to off-spring, and a possibility of both long and short term somatic and mutagenic effects on man 28

3. The ingestion of peyote can induce severe psychological harm 29

C. The hearing below was fair and the findings of the hearing officer were not arbitrary 31

Conclusion 32

APPENDIX.

(Reply Brief)

TABLE OF CONTENTS.

PAGE

I. The Government Has Not Really Responded to Either of Our Constitutional Contentions 1-4

A. Favoring the Native American Church with an Exemption to Use Peyote, and Denying Exemption to Petitioners, Violates the Establishment Clause 1-3

B. Arguing the Validity of the Doctrine of the Petitioning Church and Whether Its Belief That Peyote Is Useful to Its Aims Is an Interference with Free Exercise, as Is Also the Denial of the Exemption 3, 4

II. The "Compelling Interest" Claimed by the Government Stands Exactly as It Did in 1965 When the House Took Steps to Insure First Amendment Protection for Bona Fide Religious Use of Peyote 4-7

III. The Native American Church Has No Different Status Under the First Amendment Than Any Other Church 7-15

IV. If Sacramental Use of Peyote by the American Indians Does Not Jeopardize Public Health and Safety, Then Sacramental Use of Peyote by the Petitioners Will Not Jeopardize Public Health and Safety 15-22

V. Conclusion 23